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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 481

ROCHESTER TELEPHONE CORPORATION,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

FILED NOVEMBER 21, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

ROCHESTER TELEPHONE CORPORATION, Petitioner,

vs.

THE UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, Respondents

PETITION AND BILL OF COMPLAINT—Filed March 18, 1937

Rochester Telephone Corporation, the plaintiff above named, brings and files this, its petition and bill of complaint, against the defendants, The United States of America and Federal Communications Commission, above named, and complains and alleges:

First. That Rochester Telephone Corporation, the petitioner herein, is, and at all the times hereinafter mentioned was, a corporation organized and existing under the Laws of the State of New York, and having its principal office in the City of Rochester, County of Monroe, in said Western District of New York.

Second. That said Rochester Telephone Corporation was incorporated for the object and purpose of constructing, operating and maintaining a system of communication, by telephone, within the City of Rochester, and the County of Monroe, New York, and certain other Counties within the State of New York, all of which are located within said Western District of New York.

Third. That at all the times hereinafter mentioned said Rochester Telephone Corporation has been engaged in intrastate communication, wholly within the State of New York, and has also been engaged in interstate and foreign communication, but has been engaged in interstate or foreign communication solely through physical connection with the facilities of New York Telephone Company.

[fol. 2] Fourth. That said Rochester Telephone Corporation does not directly or indirectly control, nor is it directly or indirectly controlled by, or under direct or indirect common control with, said New York Telephone Company.

Fifth. That this is a suit of civil nature, in equity, which arises under the Constitution and Laws of the United States, wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or sums of Three thousand dollars, and is a suit to set aside, annul and enjoin the enforcement of certain orders of the defendant, Federal Communications Commission, hereinafter referred to.

Sixth. That an order was made by the defendant, Federal Communications Commission, (by the Telephone Division thereof), dated October 9th, 1935, directing said Rochester Telephone Corporation, the petitioner herein, to file full and complete responses to the orders of the Telephone Division of the Federal Communications Commission, or an answer, in writing, duly verified, setting forth any facts relied upon in justification for its failure to respond to said orders; and further ordering said Rochester Telephone Corporation to appear at the office of said Commission on December 2nd, 1935, and show cause why it should not be required to file responses to orders of said Telephone Division, numbered 1, 2, 3, 5, 6, 6a and 9. A further order was made by the defendant, Federal Communications Commission (Telephone Division), dated November 13th, 1935, amending said order dated October 9th, 1935. Copies of said order and said amending order are hereto attached marked Exhibits A and B.

Seventh. On or about October 31st, 1935, Rochester Telephone Corporation, the petitioner herein, filed with the defendant, Federal Communications Commission, its application for an order or decision that said Rochester Telephone Corporation is not subject to the jurisdiction of the Federal Communications Commission, nor bound to comply with the provisions of the Federal Communications Act or the orders of said Commission, excepting in so far as Sections 201-205 [fol. 3] of the Federal Communications Act of 1934 apply to said Rochester Telephone Corporation, because said Rochester Telephone Corporation is a connecting carrier within the definition contained in Section 3(u) of the Communications Act of 1934, and that it is exempted under Section 2(b)2 of said Communications Act of 1934 from the provisions of said Act, except in so far as Sections 201-205 of said Act, both inclusive, may apply to it.

Eighth. That thereafter an examination upon said application of the petitioner herein and upon said orders of the

Federal Communications Commission was held before the Chief Examiner of said Commission on January 8th and 16th, 1936, and the report of said Examiner was thereafter submitted to Federal Communications Commission, and exceptions to said report were duly filed with Federal Communications Commission by said Rochester Telephone Corporation.

Ninth. That thereafter a hearing was had before the Telephone Division of said Federal Communications Commission on the question whether the report of said Chief Examiner be adopted and approved, and subsequent thereto said Federal Communications Commission (Telephone Division) made and filed its written decision finding that said Rochester Telephone Corporation is under the control of the New York Telephone Company and is a wire telephone communication carrier engaged in interstate communication through physical connection with the carrier controlling, and, as such, is subject to the jurisdiction of this Commission under all common carrier provisions of the Communications Act of 1934, and, therefore, not entitled to be classified as a connecting carrier under Section 2(b)2 of said Act.

Tenth. That thereafter an order was made by Federal Communications Commission (Telephone Division), dated November 18th, 1936, as follows:

"Pursuant to the report of the Commission issued by the Telephone Division herein, it is hereby ordered that the Rochester Telephone Corporation, as a wire telephone carrier, be, and the same is hereby, classified as subject to all common carrier provisions of the Communications Act of [fol. 4] 1934, and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000.

By the Commission, Telephone Division.

November 18, 1936."

Eleventh. That thereafter a petition was filed by said Rochester Telephone Corporation with the defendant, Federal Communications Commission, for a rehearing before the full Commission upon the question whether the report of said Chief Examiner should be adopted and approved, and upon the report and order of the Telephone Division of said Commission classifying said Rochester Telephone Cor-

poration as a wire telephone carrier, subject to all the common carrier provisions of said Communications Act; and said application or petition was denied by said Commission on or about January 27th, 1937.

Twelfth. That said Federal Communications Commission in making and issuing said orders exceeded the power and authority delegated to it by the Communications Act of 1934, and said Commission erred, as a matter of law, in the following particular to wit: That said Rochester Telephone Corporation, the petitioner herein, as a matter of law, is, and upon the facts proved before said Commission by undisputed and uncontradicted evidence and found by said Commission was shown to be, a connecting carrier, as the term is defined in Section 3(u) of the Communications Act of 1934, and is engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier, not directly or indirectly controlling, or controlled by, or under direct or indirect common control with, said Rochester Telephone Corporation, and is, therefore, under the provisions of Section 2(b)2 of the Communications Act of 1934, not subject to the provisions of said Act or the jurisdiction of the Federal Communications Commission, except in so far as Sections 201-205 of said Act, both inclusive, shall apply to said Rochester Telephone Corporation.

Thirteenth. That in making said orders said Commission [fol. 5] erred, as a matter of law, in the following particular, to wit: That if, upon the facts proved before said Commission by undisputed and uncontradicted evidence, and found by said Commission, said Rochester Telephone Corporation is, under the terms of said Communications Act, subject to the provisions of said Act, or the jurisdiction of the Federal Communications Commission, except in so far as Sections 201-205 of said Act, both inclusive, shall apply to said Rochester Telephone Corporation, then said Communications Act of 1934, in so far as it applies to Rochester Telephone Corporation, exceeds the powers of Congress of the United States and violates the provisions of the Constitution of the United States and is null and void.

Fourteenth. Notwithstanding the matters and things hereinbefore alleged, the defendants, and each of them, are threatening to enforce the orders complained of above, and, unless restricted and enjoined by this Court, will enforce said orders.

Fifteenth. That if said orders of the defendant, Federal Communications Commission, hereinbefore mentioned, should be enforced against your petitioner, the enforcement thereof and the compliance therewith by your petitioner would cause your petitioner great and irreparable damage, for which it would and could have no adequate remedy at law; that the enforcement of and compliance with said orders would entail an investigation and the preparation of a vast amount of statistical and other information, which your petitioner could obtain only at large cost and expense, the amount of which cannot be accurately estimated at this time, and that your petitioner has no adequate remedy at law, and no method or proceeding exists for the review of said orders, except by this action.

Wherefore, your petitioner prays that this Court make and enter its order and decree setting aside and annulling said orders of the Federal Communications Commission hereinbefore mentioned, and each and all of them, and enjoining the enforcement of said orders, except in so far as the provisions of said orders, hereto attached marked [fol. 6] Exhibits A and B, have already been complied with.

Rochester Telephone Corporation, Petitioner, by John P. Boylan, President. T. Carl Nixon, Attorney and Solicitor for Petitioner, 31 Exchange Street, Rochester, New York.

Duly sworn to by John P. Boylan. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO PETITION

Federal Communications Commission,

Washington, D. C.,

Telephone Division

Docket No. 3293

ORDER

At a regular meeting of the Telephone Division held on the 9th day of October, 1935:

The Telephone Division having under consideration the filing of responses to its orders, and

It appearing, That the Rochester Telephone Corporation, Rochester, New York, has failed, neglected and refused to file responses as required by Telephone Division Orders Nos. 1, 2, 3, 5, 6, 6A and 9, which have been duly served upon said carrier;

It further appearing, That on the 18th day of September, 1935, a report of the Commission was issued by the Telephone Division, Docket No. 2809, relative to the application of Section 2(b)2 of the Communications Act of 1934, and that a copy of said report was duly served upon said carrier;

It further appearing, From the information and data on file with this Commission, that the Rochester Telephone Corporation is under the direct or indirect control of the New York Telephone Company with which it has a physical connection whereby the said Rochester Telephone Corporation engages in interstate communication, and is therefore subject to the jurisdiction of this Commission.

It is, Therefore, Ordered, That said respondent, the Rochester Telephone Corporation, be, and it is hereby required within 30 days from the date of the service of this order to file with this Commission fully and complete responses to the said orders of the Telephone Division, or an answer in writing duly verified, setting forth the facts upon which the respondent relies as justification, if any, for its failure to respond to the said orders of the Telephone Division.

[fol. 8] It is Further Ordered, That the Rochester Telephone Corporation shall appear at the office of the Commission in Washington, D. C., at 10:00 o'clock A. M. on the 2nd day of December, 1935, at which time it may show why it should not be required to file responses to Orders Nos. 1, 2, 3, 5, 6, 6A and 9 of the Telephone Division and this proceeding be and it is hereby assigned for hearing at that time and place.

It is Further Ordered, That in the event respondent files full and complete responses to the said order of the Telephone Division as hereinabove required, the said hearing shall be dispensed with.

By the Commission, Telephone Division.

(Signed) Herbert L. Pettey, Secretary.

Oct. 14, 1935.

[fol. 9] EXHIBIT "B" TO PETITION

Federal Communications Commission,

Telephone Division

Docket No. 3293

In re Rochester Telephone Corporation

AMENDMENT TO ORDER

The Federal Communications Commission, Telephone Division, having heretofore, on, to wit, the 9th day of October, 1935, entered a formal order requiring the Rochester Telephone Corporation to comply with certain previous orders of said Commission or file verified answers setting forth facts in justification of its failure so to do, and further ordering that the matter be set down for hearing on the 2nd day in December, 1935, on order to show cause why said corporation should not be required to file responses to such orders, which said order and notice was duly served on said corporation, on, to wit, the 14th day of October, 1935, and it further appearing to this Commission that said Rochester Telephone Corporation is subject to its jurisdiction under all provisions of the Communications Act of 1934 for the further reason that it is engaged in interstate commerce as a wire telephone communication carrier in a manner other than through physical connection with the facilities of another carrier, as provided in Section 2 (b) 2 of the Communications Act of 1934, and the Commission desiring that this additional matter be incorporated and set forth in said order as a part thereof, and be inquired into and heard at the same time on said 2nd day of December, 1935;

It is Therefore Ordered that said order and notice be, and the same is hereby, amended by incorporating therein after the fifth paragraph thereof and immediately preceding the order therein, the following paragraph:

It further appearing that the Rochester Telephone corporation is subject to the jurisdiction of this Commission under all provisions of the Communications Act of 1934, for the reason that it furnishes wire facilities and service to radio broadcasting companies for broadcasting purposes, and is thus engaged in interstate commerce as a wire communication carrier in a manner not "solely through the

[fol. 10] physical connection with the facilities of another carrier;"

It is Further Ordered that this order be served on the respondent corporation by mailing a copy thereof to its attorney of record herein and by delivering a copy of same to its designated agent in the City of Washington, D. C., if any there be.

By order of the Commission, Telephone Division.

Herbert L. Pettey, Secretary.

Nov. 13, 1935.

[fol. 11] [File endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SERVICE—Filed March 27, 1937

DISTRICT OF COLUMBIA, ss:

Harry C. Allen, being duly sworn, deposes and says that he is and was at the time of service of the papers herein referred to a citizen of the United States, over the age of twenty-one years, and that he is and was at said time a duly qualified deputy United States marshal in and for the District of Columbia and legally authorized to serve court process in said District.

That deponent personally served the subpoena hereto annexed together with the bill of complaint in the above-entitled case on the following-named, viz:

On the United States of America, by delivering to and leaving with Homer S. Cummings, Attorney General of the United States, in person true copies of said subpoena and bill of complaint on the 22nd day of March, 1937.

On the Federal Communications Commission, by delivering to and leaving with John B. Reynolds, Acting Secretary of the Federal Communications Commission, in person true copies of said subpoena and bill of complaint on the 22nd day of March, 1937.

Harry C. Allen, Deputy U. S. Marshal, District of Columbia.

Subscribed and sworn to before me this 23rd day of March, 1937. Lillian A. Trammell, Notary Public, D. C. (Seal.)

[fol. 13] B 15832

D. C. Form No. 46.

Subpoena in Equity

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

The President of the United States of America to the United States of America & Federal Communications Commission, Greeting:

You are Hereby Commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the Western District of New York, of ——, at Buffalo, N. Y., to answer unto the bill of complaint of Rochester Telephone Corporation, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable John Knight, United States District Judge at Buffalo, N. Y., this 18th day of March, A. D. 1937.

May C. Sickmon, Clerk, by —— ——, Deputy Clerk.
(Seal.)

Memorandum

The defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

[fol. 14] [File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE FEDERAL COMMUNICATIONS COMMISSION—
Filed April 19, 1937.

Comes now the defendant, Federal Communications Commission, and answers the bill of complaint filed herein by the Rochester Telephone Corporation, petitioner herein.

1. This defendant admits the incorporation of the petitioner as alleged in the first paragraph of the bill of complaint herein.

2. This defendant admits that the petitioner was incorporated for the object and purpose of constructing, operating and maintaining a system of communication by telephone within the City of Rochester, and the County of Monroe, New York, and certain other counties within the State of New York, all located within said Western District of New York as alleged in the second paragraph of the bill of complaint herein.

3. This defendant admits that the petitioner has at all times been engaged in intrastate communication, wholly within the State of New York, and that petitioner has also been engaged in interstate and foreign communication by wire solely through physical connection with the facilities of the New York Telephone Company.

4. This defendant, answering the fourth paragraph of the bill of complaint, admits that the petitioner does not directly or indirectly control the New York Telephone Company, but denies that the petitioner is not directly or indirectly controlled by, or under direct or indirect common control with, the said New York Telephone Company, as alleged in said fourth paragraph of petitioner's bill of complaint, but to the contrary, this defendant avers that the petitioner cor-[fol. 16] poration is now and at all times from its inception has been directly or indirectly controlled by said New York Telephone Company.

5. This defendant, answering paragraph five of the bill of complaint herein, admits that this is a suit of civil nature, in equity, which arises under the Constitution and laws of the United States, and admits that it is a suit to set aside, annul and enjoin the enforcement of certain orders of the defendant, Federal Communications Commission, but this defendant says that it has no knowledge as to whether or not the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

6. This defendant admits that on October 9, 1935, the Federal Communications Commission (Telephone Division) made and issued an order directing the petitioner herein to file responses to Telephone Division Orders Numbers 1, 2, 3, 4, 5, 6, 6(a) and 9, or, in event of its failure to

respond to said orders, to file a verified answer setting forth facts in justification of its failure to file such responses, and to appear on December 2, 1935, and show cause why it should not be required to file responses to said orders, and admits that an amendment to said order of October 9, 1935, was issued by this defendant on November 13, 1935, as appears from the copies of said orders attached to the bill of complaint herein as exhibits A & B, and as alleged in the sixth paragraph of the bill of complaint herein.

7. This defendant admits that on or about October 31, 1935, the petitioner filed with this defendant an application for an order or decision that the petitioner is not subject to the jurisdiction of the defendant, Federal Communications Commission, nor bound to comply with the provisions of the Communications Act of 1934 or the orders of the defendant, Commission, excepting in so far as Sections 201-205 of the Communications Act of 1934 apply to the petitioner, and alleging therein, as its reason for such requested order or decision, that it is a connecting carrier within the meaning of the definition thereof contained in Section 3(u) of the Communications Act of 1934 and, therefore, as such, exempted under Section 2(b)(2) of the said Communications Act from the provisions of said Act, except in so far as Sections 201-205 of said Act, both in-
[fol. 17] clusive, may apply to it, as alleged in the seventh paragraph of the bill of complaint herein.

8. This defendant, answering the eighth paragraph of petitioner's bill of complaint, admits that on January 8 and 16, 1936, a hearing was had before the chief examiner of the defendant, Commission, upon said order to show cause and the petitioner's application for classification as a connecting carrier, and the answer of the petitioner, and that thereafter said examiner submitted his report to the defendant Commission, and exceptions to said report were duly filed by the petitioner with the said Commission.

9. This defendant admits that after the examiner submitted his report to the defendant, Commission, on request of the petitioner, a hearing on oral argument was had before the Telephone Division of the defendant, Commission, on the question whether or not the said report of the said chief examiner should be adopted and approved, and that subsequent thereto, on to-wit, November 18, 1936, this de-

fendant made and filed its decision in writing, finding that the petitioner is under the control of the New York Telephone Company and is a wire telephone communication carrier engaged in interstate communication through physical connection with the carrier controlling, and as such is subject to the jurisdiction of the defendant, Commission, under all common carrier provisions of the Communications Act of 1934 and, therefore, not entitled to be classified as a connecting carrier under Section 2(b)(2) of said Act, as alleged in the ninth paragraph of the bill of complaint herein.

10. This defendant admits that on November 18, 1936, the defendant, Commission, in accordance with its decision, made and entered an order classifying the petitioner to be, as a wire telephone carrier, subject to all common carrier provisions of the Communications Act of 1934, and subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000, as alleged in the tenth paragraph of the bill of complaint herein.

11. This defendant admits that thereafter the petitioner filed with this defendant a petition for a rehearing before the full Commission and that said petition was denied by [fol. 18] this defendant on or about January 27, 1937, as alleged in the eleventh paragraph of the bill of complaint herein.

12. This defendant, answering paragraph 12 of the bill of complaint herein, denies that the defendant, Commission, in making and issuing said orders, exceeded the power and authority delegated to it by the Communications Act of 1934, and denies that the petitioner herein, as a matter of law, is, or was upon facts proved before this defendant, Commission, by undisputed and uncontradicted evidence shown to be, a connecting carrier, as the term is defined in Section 3(u) of the Communications Act of 1934, and is engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier, not directly or indirectly controlling, or under direct or indirect common control with, the petitioner, Rochester Telephone Corporation, and, therefore, under the provisions of Section 2(b)(2) of the Communications Act of 1934, is not subject to the provisions of said Act or the jurisdiction of this defendant, except in so far as Sections 201-205 of

said Act, both inclusive, shall apply to said petitioner; and this defendant denies that it erred, as a matter of law, in its finding to the contrary, as alleged in paragraph 12, of the bill of complaint herein because, this defendant avers, upon due consideration of the entire record in the proceeding, the provisions of the said Communications Act, and the intent and purpose of Congress in the enactment thereof, that the petitioner was, and is, by undisputed and uncontradicted evidence, beyond all reasonable doubt proved and shown to be subject to the control of, and controlled by, the New York Telephone Company, through physical connection with whose facilities the petitioner engages in interstate communications, and is, therefore, subject to the jurisdiction of the defendant, Commission, under all common carrier provisions of the Communications Act of 1934, and not entitled to classification as a connecting carrier as the term is defined in Section 3(n) of said Act, nor to exemption as such under the provisions of Section 2(b)(2) of said Act.

13. This defendant denies the statements and allegations of the petitioner in paragraph thirteen of the bill of complaint herein, but avers that such statements and allegations require no answer for reason that they are argumen- [fol. 19] tative and constitute a conclusion of the pleader and, therefore, are not well pleaded and ought to be stricken.

14. This defendant admits that unless restricted enjoined from so doing, it will insist upon and endeavor to enforce compliance with its orders by the petitioner corporation, as alleged in paragraph 14 of the bill of complaint herein.

15. This defendant, answering paragraph 15 of the bill of complaint, admits that petitioner herein has adopted the only method of procedure provided for in the law for review of said order, but denies that the enforcement of its said orders, and compliance therewith by the petitioner, would cause the petitioner great and irreparable damage as alleged in said paragraph, or any damage.

16. This defendant, further answering the bill of complaint, denies each and every allegation therein contained, excepting the matters and things heretofore specifically admitted, qualified or otherwise answered.

Wherefore, this defendant prays that the bill of complaint be dismissed, and that the defendants be granted such other

and further relief in the premises as equity may require and to the Court shall seem meet.

Hampson Gary, General Counsel; Elmer D. Hays, Assistant General Counsel; James L. McDowell, Assistant Counsel, Solicitors for the Defendant, Federal Communications Commission.

[fol. 20] *Duly sworn to by John B. Reynolds. Jurat omitted in printing.*

[fol. 21] [File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed April 19, 1937

Comes now the United States of America, defendant in the above entitled action, an answering the bill of complaint herein admits, denies, and alleges as follows:

1. This defendant admits the incorporation of the petitioner as alleged in the first paragraph of the bill of complaint herein.

2. This defendant admits that the petitioner was incorporated for the object and purpose of constructing, operating and maintaining a system of communication by telephone within the city of Rochester, and the county of Monroe, New York, and certain other counties within the State of New York, all located within said Western District of New York as alleged in the second paragraph of the bill of complaint herein.

3. This defendant admits that the petitioner has at all times been engaged in intrastate communication, wholly within the State of New York, and that petitioner has also been engaged in interstate and foreign communication by wire solely through physical connection with the facilities of the New York Telephone Company. This defendant makes no representation as to whether or not the Rochester Telephone Corporation is a common carrier engaged in in-
[fol. 23] terstate or foreign communication by radio, for the

reason that the Federal Communications Commission has made no finding or determination in respect of said question in any of the orders which are referred to in petitioner's bill of complaint and which are sought to be set aside and annulled in this action; therefore such question is not properly an issue in this action.

4. This defendant, answering the fourth paragraph of the bill of complaint, admits that the petitioner does not directly or indirectly control the New York Telephone Company, but denies that the petitioner is not directly or indirectly controlled by, or under direct or indirect common control with, the said New York Telephone Company, as alleged in said fourth paragraph of petitioner's bill of complaint, but to the contrary, this defendant avers that the petitioner corporation is now and at all times from its inception has been directly or indirectly controlled by said New York Telephone Company. This defendant further avers that the New York Telephone Company is a corporation engaged in interstate communication by wire as a common carrier for hire.

5. This defendant, answering paragraph five of the bill of complaint herein, admits that this is a suit of civil nature, in equity, which arises under the Constitution and laws of the United States, and admits that it is a suit to set aside, annul and enjoin the enforcement of certain orders of the defendant, Federal Communications Commission, but this defendant says that it has no knowledge as to whether or not the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

6. This defendant admits that on October 9, 1935, the Federal Communications Commission (Telephone Division) made and issued an order directing the petitioner herein to file responses to Telephone Division Orders Numbers 1, 2, 3, 4, 5, 6, 6(a) and 9, or, in event of its failure to respond to said orders, to file a verified answer setting forth facts in justification of its failure to file such responses, and to appear on December 2, 1935, and show cause why it should not [fol. 24] be required to file responses to said orders, and admits that an amendment to said order of October 9, 1935, was issued by the defendant Federal Communications Commission on November 13, 1935, as appears from the copies of said orders attached to the bill of complaint herein as ex-

hibits A and B thereof, and as alleged in the sixth paragraph of said bill of complaint herein.

7. This defendant admits that on or about October 31, 1935, the petitioner filed with the defendant Federal Communications Commission an application for an order or decision that the petitioner is not subject to the jurisdiction of the defendant Federal Communications Commission nor bound to comply with the provisions of the Communications Act of 1934 or the orders of the defendant Commission, excepting in so far as Sections 201-205 of the Communications Act of 1934 apply to the petitioner, for the reasons stated in said application, as alleged in the seventh paragraph of the bill of complaint herein.

8. This defendant, answering the eighth paragraph of petitioner's bill of complaint, admits that on January 8 and 16, 1936, a hearing was had before the chief examiner of the defendant Commission upon said order to show cause and the application, and answer of the petitioner filed with the Commission in response thereto, and that thereafter said examiner submitted his report to the defendant Commission, and exceptions to said report were duly filed with the said Commission by the petitioner.

9. This defendant admits that after the examiner submitted his report to the defendant Commission, on request of the petitioner, a hearing on oral argument was had before the Telephone Division of the defendant Commission on the question whether or not the said report of the said chief examiner should be adopted and approved, and that subsequent thereto, to wit, on November 18, 1936, the defendant Commission made and filed its decision in writing, finding that the petitioner is under the control of the New York Telephone Company and is a wire telephone communication [fol. 25] carrier engaged in interstate communication through physical connection with the carrier controlling, and as such is subject to the jurisdiction of the defendant Commission, under all common carrier provisions of the Communications Act of 1934 and, therefore, not entitled to be classified as a connecting carrier under Section 2(b)(2) of said Act, as alleged in the ninth paragraph of the bill of complaint herein.

10. This defendant admits that on November 18, 1936, the defendant Commission, in accordance with its decision,

made and entered an order classifying the petitioner to be, as a wire telephone carrier, subject to all common carrier provisions of the Communications Act of 1934, and subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000, as alleged in the tenth paragraph of the bill of complaint herein.

11. This defendant admits that thereafter the petitioner filed with the defendant Commission a petition for a rehearing before the full Commission and that said petition was denied by the defendant Commission on or about January 27, 1937, as alleged in the eleventh paragraph of the bill of complaint herein.

12. This defendant, answering paragraph 12 of the bill of complaint herein, denies that the defendant Commission, in making and issuing said orders, exceeded the power and authority delegated to it by the Communications Act of 1934, and denies that the petitioner herein, as a matter of law, is, or was upon facts proved before the defendant Commission by undisputed and uncontradicted evidence shown to be, a connecting carrier, as the term is defined in Section 3(u) of the Communications Act of 1934, and is engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier, not directly or indirectly controlling, or under direct or indirect common control with, the petitioner, Rochester Telephone Corporation, and, therefore, under the provisions of Section 2(b)(2) of the Communications Act of 1934, is not subject to the [fol. 26] provisions of said Act or the jurisdiction of the defendant Commission, except in so far as Sections 201-205 of said Act, both inclusive, shall apply to said petitioner; this defendant further denies that the defendant Commission erred, as a matter of law, in its finding to the contrary, as alleged in paragraph 12, of the bill of complaint herein. On the contrary, this defendant avers that substantial evidence was presented to the defendant Commission showing that the petitioner is subject to the control of, and is controlled by, the New York Telephone Company, through physical connection with whose facilities the petitioner engages in interstate communication, and that therefore petitioner is subject to the jurisdiction of the defendant Commission under all common carrier provisions of the Com-

munications Act of 1934 and is not entitled to classification as a connecting carrier as the term is defined in Section 3(u) of said Act, nor to exemption as such under the provisions of Section 2(b)(2) of said Act.

13. This defendant, answering paragraph 13 of the bill of complaint herein, denies that the Commission, in making the several orders referred to in said bill of complaint, erred as a matter of law in all or any of the particulars set forth in said paragraph 13. In connection therewith this defendant states that each and all of the several particulars wherein the defendant Commission is alleged to have erred as a matter of law as set forth in paragraph 13 of the bill of complaint constitute argumentative matter, conclusions of law and of the pleader, and therefore ought to be stricken.

14. This defendant, answering paragraph 14 of the bill of complaint, denies that it has been or now is threatening to enforce the several orders of which petitioner complains or that it will enforce said orders unless restricted and enjoined by this court. This defendant states, however, that it is ready and disposed to perform the duties imposed upon it by Section 401 of the Communications Act of 1934 (47 U. S. C. 401) if and when the defendant Commission so requests.

[fol. 27] 15. This defendant, answering paragraph 15 of the bill of complaint, denies that if the orders of the defendant Federal Communications Commission referred to in said bill of complaint should be enforced against the petitioner the enforcement thereof and compliance therewith by petitioner would cause it great or irreparable damage or any damage. This defendant has no information or belief concerning the character or magnitude of the investigation or preparation of information which compliance with said orders would necessitate on its part, nor any information or belief concerning the cost or expenditure of time and money which would be involved in compliance with said orders. And basing its denial on such ground, this defendant denies that compliance with said orders would entail an investigation and preparation of a vast amount of statistical and other information at large cost or expense, or that petitioner would therefore have no adequate remedy at law.

16. Further answering petitioner's bill of complaint and the whole thereof, this defendant denies each and every al-

legation contained therein except such as have been admitted or otherwise answered herein.

Wherefore, the United States of America, having fully answered said bill of complaint, prays that the relief sought by petitioner be denied and that the bill of complaint herein be dismissed with costs to petitioner and that the defendants have such other relief as may be just and proper

Harold F. Collins, Special Assistant to the Attorney General. George L. Grobe, United States Attorney, Western District of New York.

[fol. 28] *Duly sworn to by Harold F. Collins. Jurat omitted in printing.*

[fol. 29] [File endorsement omitted.]

[fols. 30-33] Secretary's certificate to proceedings before Federal Communications Commission omitted in printing.

[fol. 34] Federal Communications Commission

Office of the Secretary, Washington, D. C.

Certificate

I, Herbert L. Pettey, Secretary of the Federal Communications Commission, do hereby certify:

That I am the regularly elected and acting Secretary of the Federal Communications Commission, and as such Secretary I am the official custodian of the records of said Federal Communications Commission;

That the three pages attached hereto constitute and are true, exact and correct copies of three orders made, entered and promulgated by the Telephone Division of the Federal Communications Commission at a regular meeting of said Telephone Division, held in the offices of the Federal Communications Commission on the 20th day of July, A. D. 1934, to wit: Telephone Division orders numbered 1 to 3, both inclusive.

That the aforesaid orders (Telephone Division Orders numbered 1 to 3, both inclusive) have not been changed,

altered or in any way amended since the adoption and promulgation of said orders by said Telephone Division of the Federal Communications Commission, and that the aforesaid orders are in full force and effect.

Witness my signature and the official seal of the Federal Communications Commission, this the 23rd day of July, A. D. 1934.

Herbert L. Pettey, Secretary, Federal Communications Commission. (Seal Federal Communications Commission.)

[fol. 35] 10723

Federal Communications Commission

Washington, D. C.

July 20, 1934.

The Telephone Division composed of Commissioners Walker, chairman, Case and Sykes, held its first meeting today and took the following action:

Telephone Division

Order No. 1

Pursuant to section 203 (a) of the Communications Act of 1934, (approved June 19, 1934), it is Ordered that every telephone carrier subject to this Act, shall, on or before September 1, 1934, file with the Commission, schedules showing:

(a) all charges for itself and its connecting carriers for interstate and foreign telephone communication

(1) between different points on its own system, or

(2) between points on its own system and points on the system of its connecting carriers, or

(3) between points on its own system and points on the system of any other carrier subject to this Act, when a through route has been established whether such charges are joint or separate.

and showing the

(b) classifications

(c) practices, and

(d) regulations affecting such charges.

[fol. 36] Telephone Division

Order No. 2

Pursuant to section 211 (a) of the Communications Act of 1934, (approved June 19, 1934) it is Ordered that every telephone carrier subject to this Act shall, on or before September 1, 1934, file with the Commission verified copies in duplicate of

1. contracts
2. agreements, or
3. arrangements

with other carriers, or with common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act, to which it may be a party.

[fol. 37] Telephone Division

Order No. 3

Pursuant to Section 215 of the Communications Act of 1934, (approved June 19, 1934), it is Ordered that every telephone carrier subject to this Act, shall on or before September 1, 1934, file with the Commission a verified statement in duplicate showing

(1) the names of all persons or corporations in which such carrier may own stock or in which such carrier has any interest whatsoever because of common or interlocking directorates, officers, or otherwise;

(2) names and addresses of all officers and directors of said telephone carrier and of any person or corporation in which such carrier may have any interest whatsoever as defined in paragraph (1) of this order;

(3) the outstanding capital stock of all other corporations in which such carrier may be interested through stock ownership, common officers or interlocking directorates, or otherwise, or over which such carrier may have or exercise any control whatsoever so far as said corporation or corporations (in which such carrier may be interested) may be

engaged in the manufacture or furnishing of apparatus, equipment or supplies used or useful in the operation, maintenance or improvement of telephone systems or any experimental research or improvement of telephone systems or any experimental research of investigation work looking to or contemplating the development or improvement of equipment or apparatus used or useful in the operation, maintenance or improvement of any telephone system which may be subject to the provisions of the Communications Act of 1934.

[fol. 38] Federal Communications Commission.

Office of the Secretary, Washington, D. C.

Certificate

I, Herbert L. Pettey, Secretary of the Federal Communications Commission, do hereby certify:

That I am the regularly elected and acting Secretary of the Federal Communications Commission, and as such Secretary I am the official custodian of the records of said Federal Communications Commission;

That the four pages attached hereto constitute and are true, exact and correct copies of orders made, entered and promulgated by the Telephone Division of the Federal Communications Commission at a regular meeting of said Telephone Division, held in the offices of the Federal Communications Commission on the 16th day of August, A. D. 1934, to wit: Telephone Division Orders No. 5, No. 6 and No. 7.

That the aforesaid orders (Telephone Division Orders Nos. 5, 6 and 7) have not been changed, altered or in any way amended since the adoption and promulgation of said orders by said Telephone Division of the Federal Communications Commission, and that the aforesaid orders are in full force and effect,

Witness my signature and the official seal of the Federal Communications Commission, this the 16th day of August, A. D. 1934.

Herbert L. Pettey, Secretary Federal Communications Commission. (Seal Federal Communications Commission.)

(Order No. 7 not material to this case.)

[fol. 39] 10846

Federal Communications Commission,

Telephone Division

Order No. 5

Pursuant to Section 213 of the Communications Act of 1934 (approved June 19, 1934), It is Ordered that each carrier subject to this Act engaged principally in wire telephony, whose gross operating income per year exceeds $50,000, shall on or before October 1, 1934, file with the Commission a verified report in duplicate showing:

1. Its corporate history, including

A. its original capitalization, i. e., the number of shares of stock originally outstanding, and

(a) how much thereof was sold or otherwise disposed of, and

(b) what price per share was received therefor and of what the consideration specifically consisted

B. whether said initial carrier acquired any other telephone system, company or corporation by merger, consolidation, purchase or otherwise, and, if so

(a) the date of any such acquisition

(b) the names of the persons, firms, companies, corporations or systems from whom such property was acquired;

(c) the purchase price or consideration for any such merger, consolidation or other manner of acquisition, and

(1) if by issuance of stock or bonds, the price at which the same was so issued;

(d) duplicate copies of any contracts, leases, agreements or written memoranda in connection therewith.

[fol. 40] 2. Its service history, including:

A. the territory initially served by the original carrier; the number of telephones originally installed by it, together with the monthly charge for each telephone so installed and operated at said time;

B. the territory served immediately prior to the acquisition (if any) by the initial carrier, of each telephone system, company or corporation; the number of telephones in use at said time, together with the monthly charge for each telephone operated by the carrier reporting;

C. the territory served after each and every acquisition of any other telephone system, company or corporation, whether by merger, consolidation, purchase or otherwise; the number of telephones then in use at said time, together with the monthly charge for each telephone then operated by the carrier reporting;

D. each and every change made in the telephone tariffs charged by the reporting carrier from the beginning of its service to the date of this Order, and the dates when such changes became effective, the territories affected, and the number of telephones affected by each change.

[fol. 41] Federal Communications Commission

Telephone Division

Order No. 6

Pursuant to Section 202 of the Communications Act of 1934 (approved June 19, 1934), it is Ordered that each carrier subject to this Act engaged in telephony, shall, on or before October 1, 1934, file with the Commission a verified report in duplicate showing:

1. All services rendered free of charge to any person or corporation for the period from July 1, 1933, to June 30, 1934, together with

(a) the names and addresses of such persons or corporations,

(b) the character of such services.

2. All services rendered to any person or corporation at other than the regular rate for the period from July 1, 1933, to June 30, 1934, together with

(a) the names and addresses of such persons or corporations,

(b) the character of such services.

3. All services rendered by the reporting carrier for any individual, person or corporation in exchange for, or in payment of services rendered for such reporting carrier, except when such exchange of services is between common carriers;

(a) the names and addresses of such persons or corporations,

(b) the character of such services.

[fol. 42] Federal Communications Commission

Telephone Division

Order No. 7

Whereas the Interstate Commerce Commission has heretofore conducted an investigation to determine Accounting Rules for Telephone Companies in that Commission's Docket No. 25705, and

Whereas the Interstate Commerce Commission, on July 9, 1934, decided and rendered its report on Accounting Rules for Telephone Companies, and

Whereas the jurisdiction and authority to fix and promulgate accounting rules for telephone companies was transferred from the Interstate Commerce Commission to the Federal Communications Commission by operation of the Communications Act of 1934, and

Whereas representatives of certain state commissions or regulatory bodies having jurisdiction over intrastate service rendered by telephone carriers have indicated that they are desirous of being heard on said report of the Interstate Commerce Commission (decided July 9, 1934), and are desirous of filing exceptions and objections and of making suggestions with respect to said report of Interstate Commerce Commission.

It is Therefore Ordered that representatives of the several states and of the commissions or regulatory bodies thereof having jurisdiction over telephone carriers therein, and all other parties at interest, shall have until October 1, 1934, within which to file exceptions or objections to the report of the Interstate Commerce Commission, rendered in its Docket No. 25705, affecting accounting rules for telephone companies, or to suggest amendments or changes in such accounting rules for telephone companies.

It is Further Ordered that all such exceptions, objections and suggestions shall be filed in writing and fifteen copies thereof provided within the time herein specified.

Ordered by the Telephone Division of the Federal Communications Commission, this the 16th day of August, 1934.

(Order No. 7 not material to this case.)

[fol. 43] 11648

Federal Communications Commission, Washington, D. C.

Telephone Division

Order No. 6-A

Commissioners: Walker, chairman; Case and Sykes.

At a regular meeting of the Telephone Division of the Federal Communications Commission, held on the 20th day of December, 1934:

The Telephone Division, having under consideration the returns heretofore made by carriers engaged in telephony subject to the Act, pursuant to Telephone Division Order No. 6, and also having under consideration the provisions of Section 210 of the Act, to regulate the use and issuance of franks and passes, or the granting of free service, or services at less than regular charges, in interstate and foreign communication by such carriers;

It is Ordered, That each Class A Telephone carrier subject to the Act shall, on or before March 1, 1935, make a full and complete response, under oath, in duplicate, to the supplemental form questionnaire attached hereto and made a part hereof, for the period January 1, 1934 to December 31, 1934.

It is Further Ordered, That effective January 1, 1935, all Class A telephone carriers subject to the Act, shall keep their records in such manner as will enable them to furnish the Commission with the information requested in said form questionnaire for any month or months, subsequent to December, 1934, as may be requested by the Commission.

[fol. 44] It is Further Ordered, That all Class A telephone carriers subject to the Act, shall retain in their possession all original records containing the data used in compiling the response to the said form questionnaire, until such time as this Commission shall specifically authorize the destruction thereof.

By the Commission, Telephone Division, Herbert L. Pettey, Secretary. (Seal.)

[fol. 45] General Instructions for Preparing Forms in Response to Telephone Division Order No. 6-A

(1) Three copies of these blank forms are sent to each company for the following purposes:

One copy is to be retained by the company for reference in correspondence; two copies are to be filled out, with any added sheets marked "Response to Telephone Division Order No. 6-A," and returned to the Federal Communications Commission.

(2) Leave margins of ¾ inch at left side for binding.

(3) Submit the information by months for the calendar year 1934, showing totals for each month and for the year.

(4) The forms attached hereto must be followed (adding sheets similar to those attached as necessary) regardless of repetition of the data submitted originally in response to Telephone Division Order No. 6, with the following exceptions:

(a) If, with the exception of name and address, every columnar entry with respect to a succession of two or more items is identical, reference may be made to the original return in summarized form containing complete references to pages and lines.

(b) If the exhibits provided for in the last two columns of each form should agree verbatim with certain portions of the original return, make appropriate reference to the pages and lines of that return.

(5) Follow additional instructions appearing on, and pertaining respectively to, each of the Forms A to F.

[fol. 46] (6) In addition to completing the aforementioned forms, the respondent should inform the Commission in a separate statement whether restrictions, if any, are placed on the recipients respecting the use by them of such free or concession service made available to them. If any, indicate the nature of restriction and to whom applicable. By concession service is meant service rendered at rates other than the maximum rate charged for substantially equivalent service and available to the general public.

(7) The data requested should be reported to the extent that they are available. If not available, the reason for their omission should be indicated. If any records containing

data necessary to furnish complete information for period called for have been destroyed, state when same were destroyed, by whom, and under what authority.

(8) The report, submitted in duplicate, is to be sworn to as true and correct by the proper officer of the reporting carrier who, by reason of his knowledge or position, is in a position to certify to the statements made. Said affidavit shall contain the following affirmation: "This report covers and includes (except where each omission is fully explained) every service rendered by respondent, free, at concession rates (as hereinabove defined), or for considerations other than receipt in money of maximum published rates available to the general public for substantially equivalent service."

(9) You are asked to acknowledge immediately the receipt of this order and of the accompanying forms and instructions, and to advise the Commission of your compliance therewith.

[fol. 47] 11010

Federal Communications Commission

Telephone Division

Order No. 9

Commissioners: Walker, Case, Sykes.

In a Regular Meeting of the Telephone Division of the Federal Communications Commission, September 13, 1934:

The Telephone Division having under consideration Order No. 5 adopted August 16, 1934;

Pursuant to Section 213 of the Communications Act of 1934 (approved June 19, 1934), It Is Ordered that each carrier subject to this Act engaged principally in wire telephony, whose gross operating income per year exceeds $50,000, may, on or before November 1, 1934, in lieu of the information required in Order No. 5, file with the Commission a verified report in duplicate showing:

I. Corporate History:

A. Give corporate history of respondent carrier, showing capital stock now outstanding, both common and preferred, and the consideration received therefor, subdivided as between (a) cash and (b) other consideration. Explain na-

ture of such other consideration, whether property or otherwise, and money value thereof. In respect of capital stock issues beginning with 1900 show each separate issue and consideration received therefor.

B. Show all acquisitions of property since January 1, 1907, involving entire companies, or parts of companies, having 500 or more stations.

Number of stations involved in each acquisition.

Price paid, and nature of consideration; cash, property or otherwise.

State whether charges for exchange service in territory acquired were increased within two years after the purchase of the property. Give amount, nature, and reason for change in rates if data is available.

[fols. 48-60] II. Service (or Rate) History:

Show rates for the principal classes of exchange service, when the data is available, for the exchange in each state serving a city or town having the population nearest to the following list, based on the 1930 census:

Population

500	2,500	10,000	100,000	500,000
1,000	5,000	25,000	250,000	1,000,000
		50,000		

Such information shall be furnished as of December 31, of the following years: 1907, 1912, 1916, 1920, and 1924 to 1933, inclusive, and the number of stations in the local service area of each exchange must be shown for each such year.

Where changes in rates have been made by approval of public authority, the authority approving the changes must be shown.

Show the rates for the principal classes of toll service for all interstate schedules effective from January 1, 1920, to date. Where intrastate toll rates differ from interstate rates, the intrastate schedules for each state in which they are applicable must be shown together with the amount of differences in such rates. Charts shall be used to supplement the above toll rate information, and in addition a table of rates for selected routes from Washington, D. C., to at least twenty (20) different points outside of Washington having different lengths of haul, ranging from 100 miles to

3000 miles, air line, must be shown comparing in figures the rates for the principal classes of toll service for all schedules effective between January 1, 1924, and the date of this order.

It is Further Ordered that Order No. 5 of the Telephone Division of the Federal Communications Commission be, and the said Order is hereby, held in abeyance, pending receipt and examination of the data to be supplied pursuant to this Order, or until the Division may otherwise order, but otherwise said Order No. 5 shall be and remain in full force and effect.

Ordered by the Telephone Division of the Federal Communications Commission, this 13th day of September, 1934.

By the Commission, Telephone Division, Herbert L. Pettey, Secretary. (Seal.)

[fol. 61] BEFORE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C.

January 8, 1936

Rooms 1409-11-13, New Post Office Bldg., Washington, D. C.

Docket No. 3293

In the Matter of Petition of ROCHESTER TELEPHONE CORP., Rochester, N. Y., to Determine Whether This Company Comes under Jurisdiction of the Commission.

Statement of Evidence

The above-entitled matter came on for hearing before Examiner Davis G. Arnold, in Room 1413, Post Office Building at 10 o'clock a. m.

APPEARANCES

On behalf of the Commission: Frank Roberson, Esq., Assistant General Counsel, and James L. McDowell, Esq., Attorney.

On behalf of the Rochester Telephone Corporation: T. Carl Nixon, Esq., 31 Exchange Street, Rochester, New York.

[fol. 62] COLLOQUY

The Examiner: In the matter of the Rochester Telephone Corporation, Docket No. 3293. Are the parties ready?

Mr. Nixon: If your Honor please, the Rochester Telephone Corporation is ready.

Mr. Roberson: The Commission is ready.

Mr. Nixon: If your Honor please, I appear specially for the Rochester Telephone Corporation for the purpose only of denying the jurisdiction of the Commission over that company and claiming an exemption from the operation and jurisdiction of the Communications Act of 1934 and the Commission appointed thereunder. By this appearance I do not intend to subject the Rochester Telephone Corporation in any way to the jurisdiction of the Commission.

The Rochester Telephone Corporation takes the position that there is no presumption under the Communications Act of 1934 that it comes under the operation of that Act or of the jurisdiction of the Commission appointed thereunder. It further takes the position that there is no proof now before the Commission showing that the Rochester Telephone Corporation is subject to the jurisdiction of this Commission and, on the contrary, it claims that the information and data already filed by it with the Commission conclusively shows that it is not subject to the jurisdiction of this Commission but is specifically exempted from the operation of the Communications Act of 1934 and the jurisdiction of this Commission, except as to Sections 201-205, inclusive, of said Communications Act of 1934 by reason of the provisions of Section 2(b)(2) of the Communications Act of 1934.

[fol. 63] The Rochester Telephone Corporation, therefore, denies that the burden is on it to show that it is not subject to the operation of the Communications Act of 1934 and to the jurisdiction of the Commission appointed thereunder and it excepts to the order of October 9, 1935, requiring it to justify its failure to respond to Orders Nos. 1, 2, 3, 5, 6, 6-A and 9 of this Commission.

The evidence which is about to be introduced on behalf of the Rochester Telephone Corporation is offered and furnished under protest and without intent in any way to relinquish or in any way prejudice any of its rights, any of the rights of the Rochester Telephone Corporation.

The Examiner: Have you any motion to make?

Mr. Nixon: First I would ask counsel to stipulate an amendment to paragraph 7 of the answer in the eighth line where I have used the word "section" and I wish to amend the answer so as to read "sections" in the plural. I am referring to Sections 201 to 205 in the answer.

Mr. McDowell: If the Commission please, with reference to the answer filed by the respondent, in paragraph 7 of the answer the respondent alleges that "Heretofore, on or about the 30th of January, it made formal application for an order or decision, that it was not subject to the jurisdiction of the Communications Commission, and that it filed certain documents here with the Commission which it asks be made a part of this answer."

It appears that no such instruments or documents were at any time filed with the Commission and that no such application was ever filed, and it is suggested that the answer be amended, that that section of it be stricken which [fol. 64] applies to the consideration of these various documents as a part of the answer.

Mr. Roberson: Mr. Examiner, I think the record might show how the confusion arose. About a year ago Mr. Nixon submitted to the law department, at its request, some or all of the documents that he refers to there. As we understood it, it was just submitted in an informal way for the information of the law department, and there was nothing said about that being filed, and we did not think it was proper to file documents that were submitted to us in this quite informal way, it would not be right to the company itself, but in any event they have not been filed. I understand from Mr. Nixon now that in the course of the testimony he will file the documents referred to in paragraph 7 of the answer as a part of his case. I assume that the better way to handle it would be at the close of his testimony, probably, to move that paragraph 7 be amended to conform to the proof, or some such method as that. I think that would take care of it.

Mr. Nixon: If your Honor please, in connection with the statement of both counsel, the fact is that I submitted informally to the law department certain documents consisting of the certificate of incorporation, certificate of reclassification of capital stock, by-laws, the voting trust agreement and an affidavit of facts made by the president of the Rochester Telephone Corporation.

Now I propose at this hearing to introduce those same documents in evidence and to prove the facts that were stated in that affidavit by the man who made the affidavit, [fol. 65] and I think at the end of the case I shall be guided by Judge Roberson's suggestion and amend my answer in accordance with the proof as it stands at the end of the hearing.

The Examiner: It is assumed by the Examiner that the respondent's answer will be substantiated by evidence, and that part of it which is not substantiated by evidence of course cannot stand. The motion of Commission's counsel is denied and counsel for the respondent, unless he has some other motion to make, will proceed with the presentation of evidence.

Mr. Roberson: The Commission counsel did not make any motion.

The Examiner: He made a motion to strike, did he not?

Mr. Roberson: Oh, yes. May I make one statement for the record, Mr. Examiner? I desire to make a statement for the record. The original order in Docket No. 3293 was adopted on the 9th day of October, 1935, and an amendment thereto was adopted on the 13th day of November, 1935. The amendment reads as follows:

"It further appearing that the Rochester Telephone Corporation is subject to the jurisdiction of this Commission under all provisions of the Communications Act of 1934, for the reason that it furnishes wire facilities and service to radio broadcasting companies for broadcasting purposes, and, thus engaged in interstate commerce as a wire communication carrier in a manner not 'solely' through physical connection with the facilities of another carrier."

I desire to remove any possible misunderstanding as to the effect of the amendment. It was not intended by the [fol. 66] Commission to be a finding as to the facts or the law relative to any wire facilities, if any, that may be furnished by the Rochester Telephone Corporation to any broadcast station. The purpose of the amendment, and it should be so understood in this hearing, is to include in any hearing the question of control as well as the matter of telephone facilities furnished for broadcasting. Both questions are entirely open and the Commission desires that the facts

be fully developed in both phases at this hearing. It should be clearly understood that the Commission has not decided either of the questions.

I thought we might put that in the record.

Mr. Nixon: If your Honor please, I had hoped to keep the hearing on the two questions separate. Two questions are presented here. One is the question of control under Section 2(b)(2), and the other is whether the company is under the jurisdiction of the Commission by reason by leasing wires to broadcasting companies. Now I shall keep my proof separate as far as possible. My first two witnesses will be on control, the other being on radio broadcasting.

I intended to state before my three witnesses are called that the Rochester Telephone Corporation takes the position that the amendment dated November 13, 1935, to the order of October 9, 1935, is illegal, void and of no effect for the reason that there was and is no evidence before the Commission on which to base such an amendment to the order.

Further, the Rochester Telephone Corporation takes the position that the burden is on the Commission to establish the facts recited in said amendment to said order, and such [fol. 67] evidence and testimony as will be submitted by the Rochester Telephone Corporation on that subject is submitted under protest and without prejudice to any of the rights of the Rochester Telephone Corporation.

The Examiner: May I see a copy of the amended order?

Mr. Roberson: They are in the docket.

The Examiner: Counsel may proceed.

Mr. Nixon: The first witness is Fred C. Goodwin.

Whereupon FRED C. GOODWIN, a witness called on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Nixon:

Q. Your name is Fred C. Goodwin?

A. Yes.

Q. Where do you reside?

A. Rochester, New York.

Q. How long have you resided in that city?

A. A little over fifty years.

Q. What is your profession?

A. Attorney and counsellor at law.

Q. With what firm are you connected?

A. Hubbell, Taylor, Goodwin, Nixon and Hargrave. I am the senior member of that firm.

Q. How long has that firm or its predecessors been in existence?

A. Since the late 70's, say 1880.

Q. What is your present connection with the Rochester [fol. 68] Telephone Corporation?

A. Chairman of the Board, director, stockholder.

Q. And how long have you been a stockholder of the Rochester Telephone Corporation?

A. Since its organization in 1921.

Q. Prior to the organization of the Rochester Telephone Corporation were you in some way connected with the Rochester Telephone Company?

A. I was. I was secretary for a time. I can not tell you the dates. I was a director I think from 1911 until its dissolution in 1922, and I acted as its counsel from, say, 1910.

Q. Was your law firm or its predecessor attorney for the Rochester Telephone Company when that company was in existence?

A. My firm organized, that is they did the legal work of organizing the Rochester Telephone Company in, I think, 1899.

Q. And continuously since that time they have worked for the Rochester Telephone Company or the Rochester Telephone Corporation?

A. My firm was continuously the general counsel of the old Rochester Telephone Company from its organization in 1899 down to the time of its dissolution in 1922. We also organized the Rochester Telephone Corporation, which is the present operating company, and have been its general counsel ever since.

Q. Was Mr. Joseph W. Taylor one of your partners formerly connected with the old Rochester Telephone Company?

[fol. 69] A. Yes, he was one of my partners and for a number of years was secretary of the Rochester Telephone Company, the old company, and acted as its counsel.

Q. And by Mr. Taylor's resignation as director and secretary of the old Rochester Telephone Company did you succeed him?

A. I believe so.

Q. Now the Rochester Telephone ıpany, the predecessor of the Rochester Telephone Corporation, is one of the companies whose properties went into the new Rochester Telephone Corporation, is that correct?

A. That is correct.

Q. And the Rochester Telephone Company was, in telephone parlance, regarded as an independent company?

A. It was an independent company.

Q. Now are you familiar with what is meant in telephone circles by the Kingsbury commitment?

A. I am.

Q. Will you tell us very briefly what the Kingsbury commitment was?

A. Well, the Kingsbury Commitment consisted of a letter written by Mr. N. C. Kingsbury, who at that time was the executive vice-president of the American Telephone and Telegraph Company, to the attorney-general. The letter is dated December 19, 1913. The reason for that letter was this: There had been some complaints filed with the Attorney-General against the American Telephone and Telegraph Company and its associated companies under the Sherman Act, claiming that the American Telephone and Telegraph [fol. 70] Company and its associated companies constituted a monopoly. I do not know by whom those complaints were filed, I rather imagine by some of our old friends in the independent field, but I am not sure about that. In any event, the matter was under consideration by the Attorney-General's office, and Mr. Kingsbury was handling the matter for the American Telephone and Telegraph Company and their companies.

Those conferences between Mr. Kingsbury and the Attorney-General's office resulted in this letter which I have referred to, written by Mr. Kingsbury to the Attorney-General and dated December 19, 1913. That letter is called the Kingsbury Commitment. That letter was a commitment on the part of the American Telephone & Telegraph Company to do certain things. One thing was to dispose of its stock in the Western Union Telegraph Company. Another was, and probably the one thing most important here, is that it constituted a commitment, or stated the commitment on the part of the American Telephone and Telegraph Company and its associated companies that it would not acquire any additional independant companies except with

the permission of the Department of Justice. The reason I know that, at that time the independent companies were very much exercised about the Bell companies, we might as well call them, acquiring independent companies here and there and thereby breaking down the in-pendent organizations.

I might go back a little ways, down to, we will say, the middle of the 90's, around 1895, when the Bell companies had what amounted to practically an absolute monopoly of the telephone business because of the Bell patents, but [fol. 71] those expired, or were about to expire at that time. That gave rise to the organization of a great number of independent telephone companies all over the country, not only independent telephone operating companies but independent telephone manufacturing companies, and it was like a wave that swept all over the whole country. Some of those companies were successful for a time, but gradually they got into difficulties. The reasons I do not think are particularly important, but in a word they were not able to raise the capital which was necessary for extensions and additions. I do not think they realized the problems of depreciation as well as the Bell organization did and they started to go down hill. The Bell Company saw an opportunity to buy up a number of these companies, and they did, and I think that was what gave rise to the complaints before the Attorney-General, and it was to help that situation that this commitment was made by the American Telephone and Telegraph Company that they would not, without the consent of the Attorney-General, buy up or acquire any additional independent companies.

Q. Have you produced a copy of the letter of December 19, 1913, from Mr. Kingsbury to the Attorney-General which outlines the Kingsbury commitment which you have just described?

A. I have a copy of it before me.

Mr. Nixon: I would like to offer that in evidence, if your Honor please. I am not able to produce the original. It must be in the files of the Attorney-General. It is an old document, but I am prepared to furnish copies. I will ask the witness to state whether or not he knows that the copy [fol. 72] of that letter now produced is an accurate copy of the Kingsbury commitment, as the witness understands it.

The Witness: I can not say so of my own knowledge. I can say, however, that Mr. Kingsbury himself sent me a copy of what he said was his letter to the Attorney-General. I do not know whether that testimony will go with this Court or not.

Mr. Roberson: Mr. Examiner, we have a copy from the Department of Justice in our files.

Mr. Nixon: If there are any discrepancies I will be glad to stipulate that they may be corrected. I will offer two copies for the record.

The Examiner: If there is no objection it may be admitted as Respondent's Exhibit No. 1.

(The document referred to was marked "Respondent's Exhibit No. 1, Docket No. 3293," received in evidence and is filed with the transcript in the possession of the Commission.)

By Mr. Nixon:

Q. Sometime subsequent to the Kingsbury commitment will you state whether or not negotiations were had for organizing a new telephone company in Rochester to be composed of the properties of the New York Telephone Company and the old Rochester Telephone Company?

A. That is the fact.

Q. Did those negotiations lead to any affirmative act by any of the parties?

A. Yes. Those negotiations led eventually to several contracts, that is, three or four anyhow, providing, in gen- [fol. 73] eral, for the organization of a new telephone company to be known as the Rochester Telephone Corporation, to take over the telephone properties in Rochester and what might be called the territory naturally tributary to Rochester, taking over the properties of both the independent company, the Rochester Telephone Company and the Bell Company which was the New York Telephone Company.

Q. Who acted for the Rochester Telephone Company in those negotiations?

A. Mr. George R. Fuller, the President, and myself, principally.

Q. Did those negotiations result in the transmission of any letter to the Attorney-General?

A. They did.

Q. On what date?

A. On November 9, 1917.

Q. What happened on that date?

A. Along with the negotiations for the consolidation of the two properties in Rochester and vicinity were two other similar consolidations which were under consideration. One involved the City of Buffalo, New York, where there were both an independent company and a Bell company, and in the City of Jamestown, New York, which is a short distance south or southwest of Buffalo, where there were also two companies. In each case we had been negotiating for two or three years. Those negotiations resulted finally in contracts in Rochester and Jamestown. Those contracts provided that a new independent company, so-called, should be organized to take over the properties of both companies, and [fol. 74] that in Buffalo the Bell, the New York Telephone Company, should take over the properties of the independent company, which was called the Federal Telephone & Telegraph Company.

At the date of this letter the contracts for Jamestown and Buffalo had been executed, but they were, as I recollect, subject to the approval of the Attorney-General. The contract for Rochester had not been executed but it had been practically agreed upon.

This letter of November 9, 1917, is another letter written by Mr. Kingsbury to the Attorney-General and placing before the Attorney-General the plans which had been made and the contracts which had been entered into, and the contract for Rochester which was proposed covering, in each case, the consolidation into one operating company of the properties of both the independent company and the Bell company in Buffalo, Jamestown and Rochester.

As I think I have already stated, the contract in Buffalo provided for the acquisition of the independent properties by the New York company. In each of the other two cases it provided for the acquisition of the Bell company properties by a new corporation to be organized with independent officers, directors and management.

Q. Are you able to produce a copy of the letter of November 9, 1917, from Mr. Kingsbury to the Attorney-General outlining the plans of the consolidation you have just described?

A. I have a copy of that letter before me.

Mr. Nixon: I would like to offer that in evidence.

The Examiner: Is there any objection?

[fol. 75] Mr. Roberson: No objection.

The Examiner: It may be admitted as Respondent's Exhibit No. 2.

(The document referred to, marked "Respondent's Exhibit No. 2, Docket No. 3293," was received in evidence and is filed with the transcript in the possession of the Commission.)

The Witness: There is one thing that I would like to add at this point, and that is this: Down to that time there had been a number of propositions for sales and purchases of telephone companies throughout the country submitted to the Department of Justice and a practice had grown up in the Department,—I do not think it was hard and fast, but it was a general practice,—that the department would refuse to approve the acquisition of any independent companies by the Bell unless, as part of the same transaction, the Bell Company gave up as many stations, or practically as many stations or telephones as they were acquiring. The thought being that if the Bell interests gave up a certain number of stations at the time they acquired substantially the same number from independents that their monopoly in the telephone field would not be increased by that transaction.

So, as I say, that practice grew up in the department, and the three transactions which I have mentioned, in Buffalo, Jamestown and Rochester, were worked out on that basis. Through the acquisition of the independent company in Buffalo the New York company acquired some 32,000 stations. At the same time they gave up or sold to Jamestown and Rochester independent companies something over 35,000 stations.

By Mr. Nixon:

[fol. 76] Q. Now in this letter to the Attorney-General, dated November 9, 1917, I notice that there are said to be certain enclosures, the first being an outline of the unsatisfactory telephone conditions now existing in western New York, and I ask whether you are able to produce a copy of that outline?

A. I have a copy of that, and I know it to be a copy. I assisted in the preparation of that paper. That is one of the

papers which was submitted to the Attorney-General with Mr. Kingsbury's letter of November 9, 1917.

Mr. Nixon: I offer that outline in evidence.

The Witness: I can add this, that I know that the facts stated therein were true at the time.

The Examiner: Is there any objection?

Mr. Roberson: No objection.

The Examiner: It may be admitted as Respondent's Exhibit No. 3.

(The document referred to, marked "Respondent's Exhibit No. 3, Docket No. 3293," was received in evidence and is filed with the transcript in the possession of the Commission.)

By Mr. Nixon:

Q. Now subsequent to the transmission of the letter of November 9, 1917, to the Attorney-General was there an agreement executed between the men representing the Rochester Telephone Company and the New York Telephone Company, and others?

A. There was. There was an agreement dated February 25, 1918, and I have a copy of that agreement before me. [fol. 77] The parties to that agreement were George R. Fuller, who was then the president of the old Rochester Telephone Company, Mr. W. Roy McCanne, who was a director, and Mr. Frederick W. Zoller, who was also a director of the old Rochester Telephone Company. The Rochester Telephone Company itself was a party, and the New York Telephone Company was the other party to that agreement.

Q. Do you know that the copy which you are producing is an exact copy of the original contract?

A. Well, I haven't compared it word for word, but I have read it through and I am confident it is.

Q. Was it prepared in your office?

A It was prepared in my office by my own stenographer and copied by her from the original signed contract.

Q. Now in negotiating and making and reducing to writing the original contract did you act for the Rochester gentlemen who were representing the Rochester Telephone Company?

A. I did.

Q. Now I would like to have you state for the record briefly the terms of that contract, and I will ask you to do it either before or after I offer it in evidence.

Mr. Nixon: Shall I have him state it before or after I offer it in evidence? I will do as you say.

Mr. McDowell: This is the main pre-organization contract?

Mr. Nixon: Yes.

The Witness: It is the contract of February 25, 1918.

Mr. Nixon: Counsel has asked me if that may be called [fol. 78] the pre-organization agreement. I have called it the main consolidation agreement, because it has been amended several times by supplemental agreements, therefore, I distinguish it from the others by calling it the main agreement and supplemental agreements. I might say it is the contract as the result of which, with certain amendments, the Rochester Telephone Corporation, as it exists today, was in fact organized.

The Examiner: You offer it in evidence?

Mr. Nixon: I offer it in evidence.

The Examiner: If there is no objection it may be received and marked Respondent's Exhibit No. 4.

(The document referred to, marked "Respondent's Exhibit No. 4, Docket No. 3293," was received in evidence, and is filed with the transcript in the possession of the Commission.)

By Mr. Nixon:

Q. Now will you please state briefly for the record the principal provisions of the contract of February 25, 1918, so far as they affect the Rochester Telephone Corporation?

A. Well this contract of February 25, 1918, provided, first of all, for the organization of a new corporation to be known as the Rochester Telephone Corporation. That is the present operating corporation in Rochester today. It provided that the Capital stock should be $7,000,000, to consist of 70,000 shares of the par value of $100 each, of which 69,000 shares, or $6,900,000, should be preferred stock, and 1,000 [fol. 79] shares of common stock. It then provides for the rate of dividends to be paid on the preferred stock.

The Examiner: What are those figures now?

The Witness: $7,000,000 total capitalization, $6,900,000 of preferred stock, and $100,000 of common stock, par value $100 each in each case.

Now at the risk of being somewhat lengthy I think perhaps at this time I should mention the rate of dividends on the preferred stock provided in the certificate of incorporation and in this agreement. The preferred stock mentioned in this agreement and the preferred stock provided for in the original certificate of incorporation was provided for the purpose of paying to the New York Company the purchase price of all their properties in the territory which the Rochester Telephone Corporation was to acquire. That was done. The properties were appraised. Their values were later determined by the Public Service Commission of the State of New York, and payment was made at the price fixed by the Public Service Commission of the State of New York, entirely in preferred stock, at par.

Now it was realized that the new corporation could not immediately begin the paying of dividends upon this preferred stock. It was recognized that it must have a breathing spell, so-called, and so it was provided, both in this agreement and in the certificate of incorporation, that for the first two years of the corporate existence the dividends on the preferred stock should not be cumulative to any extent. It was also provided in the agreement that if the transfer of these properties took place after the 1st day of April, in any year, that the remainder of that year should [fol. 80] not be counted.

The fact developed that the transfer of these properties was made on the first day of August in 1921, or the 31st day of July, 1921, and that therefore, under the provisions of this agreement and the certificate of incorporation, the Rochester Telephone Corporation was not obligated to pay any dividends upon this preferred stock, and they were not cumulative for two years and a half.

Then in the third year of the existence of the corporation the agreement provides that the dividends shall be cumulative at the rate of, I think it was, 3 per cent, that is, for the second fiscal year the dividends should be cumulative at the rate of 3 per cent, for the fourth year 4 per cent, and thereafter to the full amount of the preferred dividend of 5 per cent.

As a matter of fact that program was exactly carried out. For two and a half years we paid no dividends at all. The third year we paid a dividend of 3 per cent on the preferred stock. We paid 4 per cent on the fourth year, and since then we have paid 5 per cent.

Mr. Roberson: Mr. Examiner, may I interpolate a question, since he is on this subject? Is there any provision in the contract for the retirement or calling of that preferred stock?

The Witness: None whatever. It is non-callable. There is a provision in that preferred stock, a participating feature, which has never come into operation and which I very much doubt if it ever can. That is, that there is a limit placed on the dividends which may be declared and paid [fol. 81] on the common stock. They may not be greater than the dividend paid on the preferred stock which, down to the present time, has meant not more than 5 per cent. Should, however, there be a greater dividend than 5 per cent paid on the common stock this preferred stock would be entitled to participate up to 8 per cent, but not beyond that, that is up to 3 per cent additional to the 5.

The Examiner: Have you a sample copy of that preferred stock certificate here, a share of the stock?

The Witness: No.

Mr. Nixon: We have got the language used on the certificate.

The Witness: We will have the certificate of incorporation, which states all the features of that. As a matter of fact I do not think we got out either an engraved or printed stock certificate. I think it is all in one typewritten certificate.

Now provision was made in the contract for a mortgage, an open end mortgage, to secure an issue of bonds up to the amount of $5,000,000. That was subsequently amended by a later agreement, because we found the $5,000,000 in all probability would not be enough, and that amount of $5,000,000 of bonds was increased to $10,000,000.

Now the agreements provide that both companies shall turn over to the new company to be organized all their properties within the territory described in the agreement, and described with great particularity, but which, in general, was the City of Rochester and the territory which is naturally tributary to Rochester, which means the Genesee [fol. 82] Valley in general. It covers 1,986 square miles.

Mr. Nixon: I might say for the record that I prepared for the witnesses Boylan and Morrison to give more detail about the territory served by the Rochester Telephone Corporation.

The Witness: It might be useful to add right at this point that the population of that territory is, in round figures, 500,000.

I have said that the agreement provided that both of the old companies, both the Rochester Company, the independent company, and the New York Company, the Bell, should turn over to the new company all their properties in this district, with this one exception, that the New York Company was not to turn over to the new company its through toll lines. They turned over some toll lines but not their through toll lines. With that exception all the properties in this district, of both companies, were to be turned over, and were turned over to the new company.

Now, as I have already said, the New York Company was to take in full payment for all its properties preferred stock at par. The Rochester Company, on the other hand, was to be paid cash equivalent to the difference between the value of its properties as appraised for consolidation purposes and as approved by the Public Service Commission and the amount of its outstanding mortgage bonds, which the new company assumed.

The Examiner: Can you give us those amounts now?

Mr. Nixon: $1,090,000.

The Examiner: How much to each?

[fol. 83] The Witness: The bonds of the Rochester Company were something between $1,000,000 and $1,100,000, and my recollection of the total figure is $1,068,000.

The Examiner: Are you going to give those to us in detail in some other way?

Mr. Nixon: Well, this contract sets them out as they existed at the date of this main agreement.

The Witness: That is in the agreement.

The Examiner: Were they paid the price in the agreement?

The Witness: Yes.

Mr. Nixon: There was a provision in the agreement for the exchange of the bonds of the new corporation dollar for dollar for the outstanding bonds of the Rochester Telephone Company.

The Examiner: What I am trying to find out is whether the agreement was carried out.

Mr. Nixon: Yes.

The Examiner: Was there a settlement made on a different basis?

Mr. Nixon: No, we will show you exactly how the agreement was carried out.

The Witness: The settlement was made identically on the basis stated in this Exhibit 4, except possibly for some change which the Public Service Commission required, and that was simply a reduction of the price, but my recollection is that in the case of the Rochester properties there was no such reduction in price. The amount of the bonds outstanding was $1,058,500.

[fol. 84] By Mr. Nixon:

Q. By that you mean the bonds of the old Rochester Telephone Company?

A. Yes. Those were assumed, the payment of those bonds was assumed by the new Rochester Telephone Corporation.

The Examiner: I take it, for the sake of this record, that I am not so much concerned with what the agreement was as set forth in Exhibit 4 as I am with what really happened.

Mr. Nixon: What actually was done, that is right.

The Examiner: You are going to give us, for the record, what actually happened?

Mr. Nixon: Absolutely.

The Witness: I think this accords exactly with the provisions of the agreement. This is the way the Rochester property, the old Rochester properties were acquired: They had outstanding first mortgage bonds of $1,058,500. Those were assumed by the new company. The appraised value of the entire Rochester property was $1,597,500. The difference between those two figures is $539,000. I was evidently mistaken in saying that that was paid in cash. That was paid in first mortgage bonds of the Rochester Telephone Corporation, but those bonds have since been paid, so the stockholders got their cash eventually.

By Mr. Nixon:

Q. Have you finished your description of the terms of this main agreement of February 25, 1918?

A. Yes.

Q. If you have I will ask you a few direct questions. State whether or not any provision was made in that con-
[fol. 85] tract for the inventorying and appraisal of the properties of the two contributing companies?

A. Well, I can say in general the agreement provides that the properties of both companies should be inventoried and appraised on identically the same basis, and that the price to be paid should be subject to the approval of the Public Service Commission of the State of New York. They were inventoried and appraised on what we considered a conservative basis. I think the figures with regard to the Rochester Company were not changed, but the Public Service Commission did require a reduction I think of about $400,000, and a settlement was made on the basis of the figures approved by the Public Service Commission.

There is one thing in addition which I want to state about that contract, and also a supplemental contract which will come along later, and this supplemental contract was also submitted along with the main contract to the Department of Justice.

Q. With that letter of November 9, 1917?

A. Yes, November 9, 1917. Both of these agreements were submitted at the same time. That agreement provides the method by which the Rochester individuals who were to carry on this new company might acquire their stock control of that company. We had a very peculiar situation to meet in Rochester. Along in 1905 and 1906, we will say, 1904 and 1905 we, in Rochester, thought we had the world by the tail in the telephone field. We had a large telephone manufacturing company, the Stromberg-Carlson Company, which we had bought in Chicago and moved to Rochester, that was [fol. 86] going great guns and everybody thought was making a lot of money.

Q. When you say "we" you do not mean the Rochester Telephone Corporation?

A. I mean we in Rochester.

Q. The citizens of Rochester?

A. The general public. We had the Rochester Telephone Company, which I mentioned a number of times, which we thought was a very successful independent company, and somebody got the idea that we had to have something corresponding to the American Telephone and Telegraph Company, a sort of a mother to all the independent companies in the country. Well, we started out with a great parade, we conceived a very elaborate plan, organized a very large company, sold about $17,000,000 or $18,000,000 of bonds, based to a large extent on the fact that we believed we had a fran-

chise to operate a telephone company in the City of New York, and inside of a couple of years the whole thing blew up, because it was then discovered that some of our good friends in the legal field had not gone into the question sufficiently and instead of having a franchise in the City of New York, as they said we had, we did not have any franchise at all. The mortgage was foreclosed, the property bid in, and I think the net result, except to stockholders who went into a sort of a reorganization, was $16 on each $1,000 bond. That probably cost the City of Rochester at least $10,000,000 or $12,000,000.

Q. What was the name of the corporation organized whose bonds were sold?

[fol. 87] A. The United States Independent Telephone Company. We had not forgotten that when we got down to this proposed consolidation of the Bell and independent properties, and it was desired by all that the same gentlemen who had been running the old independent company should continue to run the new corporation, and the question was how that should be arranged. After we had agreed upon that, which was that they should have two-thirds of the voting stock, the question was how they should pay for it. They were not in any position to put in more money into any telephone proposition, so it was finally agreed with the New York Company that these three gentlemen who made this agreement, Mr. Fuller, Mr. McCanne and Mr. Zoller, should be paid by the New York Company for their services in organizing this new corporation, or their services in consolidation, the sum of $70,000, but they should utilize $66,500 in the purchase of 665 shares, which would be two-thirds, approximately, of the common stock of the new corporation. That was done. Those gentlemen purchased that stock with that money and then distributed it later.

Q. The agreement you have just referred to is the supplemental agreement of February 25, 1918, is that correct?

A. That is correct.

Q. And that is supplementary to the agreement of the same date which we have just introduced in evidence and which we referred to as the main consolidation contract?

A. That is Exhibit 4, I believe.

Q. Are you able to produce a copy of that supplemental contract of February 25, 1918?

[fol. 88] A. Yes.

Q. Will you produce it?

(Witness produces document.)

Mr. Nixon: I offer that in evidence.

The Examiner: What is the date of that supplemental agreement?

Mr. Nixon: February 25, 1918. It is the same date as the main agreement.

The Examiner: If there is no objection it may be admitted as Respondent's Exhibit No. 5.

(The document referred to, marked "Respondent's Exhibit No. 5, Docket No. 3293," was received in evidence and is filed with the transcript in the possession of the Commission.)

The Witness: That supplemental agreement, the parties to that supplemental agreement are only the three individuals, Messrs. Fuller, McCanne and Zoller, and the New York Company. The Rochester Company was not a party to that agreement, had no part in it.

Mr. Roberson: That is Exhibit No. 5?

The Witness: Yes.

By Mr. Nixon:

Q. Now I believe you stated this, but I want to make it clear, that both the main contract of February 25, 1918, and this supplemental agreement of the same date were submitted to the Attorney-General along with the letter of November 9, 1917?

A. That is correct.

Q. Now were there other arrangements in the supple-[fol. 89] mental agreement with reference to the acquisition by Messrs. Fuller, McCanne and Zoller of common stock in the new company?

A. You refer to the voting trust agreement?

Q. That is correct, yes.

A. Yes, there was a provision in the supplemental agreement that the individual parties; that is the three parties, Fuller, McCanne and Zoller, should purchase this 665 shares of common stock of the new company and that they should subject it to a voting trust agreement, which is

provided for somewhat in detail. It provides that the voting trustees should be three in number and should be residents or businessmen of the territory, and that means the territory prescribed for this new corporation to operate in, it provides that those three men shall be in no way affiliated or connected with the American Telephone and Telegraph Company or the New York Company, or either of their associated companies, but there should be a depositary to be a trust company in the State of New York to act as depositary for the voting trustees, and other provisions which are customary in voting trust agreements in the State of New York which are expressly authorized by statute.

The Examiner: Is the voting trust agreement a part of this?

The Witness: The voting trust agreement itself is not part of this agreement, no. That will be offered later.

Now the agreement also provides that the voting trustees, in voting for directors of the company, shall vote for at least the majority of the board who shall be residents or [fol. 90] businessmen of the territory and in no way affiliated or associated or connected with the American Telephone and Telegraph Company or the New York Company.

Mr. Roberson: Has the life of this voting trust agreement expired?

Mr. Nixon: No. The witness will testify to that.

The Witness: I might as well cover that right now. It has and it has not. The first voting trust agreement was made effective August 1, 1921. At that time the laws of the State of New York permitted a voting trust agreement only for five years, so that could only be made to last until 1926. In 1926 that same voting trust agreement was continued for ten years, our law having been then changed, so that a voting trust of ten years was permissible, and the present voting trust which will expire August 1, 1936, will be extended for another term of ten years.

Mr. Nixon: Now this witness is in a position to say that, if your Honor please, because I shall show subsequently that this witness and his wife own 665 shares of the common stock of the Rochester Telephone Corporation, and have control of the stock which has been and now is in that voting trust, but I will come to that in a moment.

By Mr. Nixon:

Q. Now referring again to the main agreement of February 25, 1918, in describing the corporation to be set up, was there any provision made for cumulative voting for directors?

A. There was.

Q. And in the certificate of incorporation prepared pur- [fol. 91] suant to the provisions of that agreement was such a provision incorporated?

A. There was. The purpose of that, if you would like to have me state it, was this. The purpose of that was to insure to the New York Telephone Company a representation, but no more than a minority representation upon the board of directors. The common stock, consisting only of 1,000 shares, was owned, 665 shares, or approximately two-thirds, by the Rochester individuals, the other one-third was bought and paid for in cash by the New York Company, and has been owned by the company ever since. [fol. 92] The cumulative voting was provided for, as I say, so that New York might be sure of retaining a representation on the board of directors. A similar provision was made with respect to the executive committee of five. Cumulative voting is provided for there so that they may have a representation of two out of the five members.

Q. When you referred to New York several times you meant the New York Telephone Company?

A. I mean the New York Telephone Company.

Q. Now, was this main agreement of February 25, 1918 subsequently modified by an agreement of a later date?

A. Yes. I think there were one or two modifying agreements, but the modifications were not substantial, as I recollect.

Q. I am referring now to a supplemental agreement dated March 1, 1920.

A. March 1, 1920. Well, that is a supplement to the main agreement of February, 1918. The parties are the same, and the changes are these: As I have already said, the amount of mortgage bonds provided for in the main agreement was $5,000,000. That was increased to $10,000,000. The mortgage was drawn, and the mortgage is still in existence, providing for a maximum of $10,000,000 of bonds. Provision was made also in that supplemental agreement, a provision which was never used, for the issuance and sale

of 5 years 7 per cent secured gold notes to the amount of $3,000,000. If you will recollect, in 1921 money was not quite as easy as it is today, and we saw difficulties in placing our bonds to advantage. As a matter of fact, I tried to nego- [fol. 93] tiate a sale of a small block of our first mortgage bonds in New York in, I think it was, the fall of 1921, and the proposition that I got from one of our good brokers down there was that if we would make the coupon rate 8 per cent he might pay us 84 for the bonds. We thought that was a little too much to pay, and so we did provide in this supplemental agreement for a short term secured note, but that was never used.

The Examiner: How many supplemental agreements are there, all told?

The Witness: Two of them.

The Examiner: The first one is marked Exhibit 5 and the second one you have?

Mr. Nixon: I am going to offer that in evidence right now. I do now offer this in evidence.

The Examiner: That is dated what?

Mr. Nixon: March 1, 1920. I ask to have it marked Respondent's Exhibit No. 6.

The Examiner: If there is no objection Respondent's Exhibit No. 6 may be admitted.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 6, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

By Mr. Nixon:

Q. Now, have you described all the important changes made in that amended agreement of March 1, 1920, to the original consolidation agreement of February 25, 1918?

A. I think so, all that I would consider important, but it might be well to briefly mention this: The agreement was amended so as to provide that the consolidation might take [fol. 94] place some months later than the original agreement provided. It extended the time within which the job might be done. It added certain properties of two small telephone companies that the Rochester Company had acquired. It gave the New York Company an option to purchase certain bonds, but they never purchased them. I think those are all the items that are of any importance.

Q. Now, was there a further supplement to the agreement of February 5, 1918?

A. There was one dated May 1, 1921, I believe.

Q. Will you produce that?

A. I have that here.

Q. Will you describe briefly for the record what changes in the main agreement were made by that supplemental agreement of May 1, 1921?

A. Well, there was a provision to take care of the payment to the two old companies of net additions to plant made subsequent to February, 1920, and those net additions were to be paid for in bonds. Those net additions were not large, but they had not been covered by the main agreement, because that only came down to the date of February 29, 1920. Then there is also an agreement in that supplemental agreement that the New York Company would loan to us for purchase not to exceed $150,000 of our first mortgage bonds. That was for the purpose of giving us cash working capital which we had no other means of getting in any other way.

Mr. Nixon: Now, I offer in evidence the supplemental agreement of May 1, 1921.

The Examiner: If there is no objection it may be admitted [fol. 95] as Respondent's Exhibit No. 7.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 7, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

By Mr. Nixon:

Q. Was the plan outlined in Mr. Kingsbury's letter to the attorney general of November 9, 1917 approved by the attorney general at any time?

A. It was.

Q. And how was that approval indicated?

A. That was indicated by a letter to Mr. Kingsbury from the Department of Justice dated January 11, 1918.

Q. Can you produce a copy of the letter?

A. It was written and signed by Mr. G. Carroll Todd who, I believe, was then the assistant to the attorney general.

Q. Can you produce a copy of that letter?

A. I have a copy before me.

Mr. Nixon: I offer that in evidence.

The Examiner: If there is no objection it may be admitted as Respondent's Exhibit No. 8.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 8, Docket No. 3203," and is filed with the transcript in the possession of the Commission.)

Mr. Roberson: Mr. Goodwin, you stated that that was approved by the Department of Justice. I just read that letter. I wonder if you would not want to restate that.

The Witness: Yes, I will put it this way: I am familiar [fol. 96] with the last paragraph of that letter, which I have seen in the same form in a great many of the letters, and that is this: "Assuming the facts and conclusions stated in your letter of November 9, 1917, and disclosed by the other data submitted, to be accurate and complete in all respects," and so forth, there is nothing omitted there that is of importance, "The proposed plan for readjustments at Buffalo, Rochester and Jamestown and in the tributary districts, taken by itself, would not in the opinion of the Department be contrary to that commitment." That commitment, I take it, refers to the Kingsbury commitment.

By Mr. Nixon:

Q. That is what you had in mind?

A. I will amend my statement by saying that we took that as an approval. Whether we were justified in so doing or not I cannot state.

The Examiner: Exhibit 8 is an answer to Exhibit 2?

Mr. Nixon: That is correct.

The Witness: That is correct. Now, we might also offer at the same time Mr. Kingsbury's letter to the attorney general dated January 16, 1918, which is his acknowledgement and reply to Mr. Todd's letter of January 11, 1918.

Mr. Nixon: I now offer in evidence the letter from Mr. Kingsbury to the attorney general dated January 16, 1918.

The Examiner: Exhibit No. 9 is a letter from Mr. Kingsbury to the attorney general dated January 16, 1918?

The Witness: That is correct.

Mr. Nixon: I offer that as Exhibit No. 9.

The Examiner: If there is no objection Respondent's [fol. 97] No. 9 will be admitted.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 9, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

Mr. Nixon: Now, I wish to introduce in evidence the certificate of incorporation of the Rochester Telephone Corporation.

The Examiner: What is the date of that?

Mr. Nixon: February 14, 1920.

The Examiner: Unless there is objection it will be admitted as Respondent's Exhibit No. 10.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 10, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

Mr. Nixon: Now, I offer in evidence the by-laws of the Rochester Telephone Corporation.

The Examiner: What is the date of that?

The Witness: They were adopted sometime in 1920.

The Examiner: Isn't there something that shows when they were adopted?

The Witness: No.

Mr. Nixon: No, these are copies of the printed book.

The Examiner: Let the witness testify as to the date.

The Witness: They were adopted sometime during the year 1920, intermediate of the organization of the company and the consolidation, the taking over of the properties. I think there has been one amendment and one only.

The Examiner: Does the date of the amendment show?

[fol. 98] Mr. Nixon: Yes, it shows in the by-laws.

The Examiner: I mean does the date of the amendment to the by-laws show?

Mr. Nixon: Yes, it shows in the copy which I am furnishing here.

The Witness: That amendment was August 26, 1927.

By Mr. Nixon:

Q. Was that the only amendment ever made to the by-laws?

A. So far as I recollect that is the only amendment. This was an amendment to simply permit of the signing of payroll checks on the machine.

The Examiner: Unless there is objection it may be admitted as Respondent's Exhibit No. 11.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 11, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

Mr. Nixon: Now, I offer in evidence the voting trust agreement dated August 1, 1926.

The Examiner: Let us have the first one first.

Mr. Nixon: I came here prepared to put in evidence the voting trust agreement which is in effect today, which is this one I am just offering.

The Examiner: You are not going to offer the other one?

Mr. Nixon: I have just offered in evidence the voting trust agreement dated August 1, 1926.

The Examiner: Unless there is objection it will be admitted as Respondent's Exhibit No. 12.

[fol. 99] (The document referred to was received in evidence, marked "Respondent's Exhibit No. 12, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

By Mr. Nixon:

Q. I will ask you whether or not that agreement is still in effect as of this date?

A. It is.

Q. When, by its terms, does it expire?

A. August 1, 1936.

Q. Prior to the agreement which you are now looking at, Respondent's Exhibit No. 12, was there another voting trust agreement between the common stockholders of the Rochester Telephone Corporation and voting trustees?

A. There was a prior agreement made exactly at the time of consolidation, which was July 31, or August 1, 1921, between the same parties, Messrs. Fuller, McCanne and myself, the owners of two-thirds of the common stock, and the Lincoln Alliance Bank & Trust Company, which was to be the depositary of the voting trustees.

Mr. Nixon: Now, I am going to offer in evidence a stock record certified by the Lincoln Alliance Bank & Trust Company of Rochester, showing the ownership of the voting

trustees' certificates from the date of the organization of the corporation down to the present time.

The Examiner: What is a brief title of that?

The Witness: A copy of their stock record.

Mr. Nixon: The stock record of voting trust certificates.

The Examiner: What is the date?

Mr. Nixon: It is dated, certified December 31, 1935.

[fol. 100] The Examiner: As of that date?

Mr. Nixon: That is correct.

The Witness: Not only as of that date but covering the entire period of that voting trust period from August 1, 1926.

Mr. Nixon: That, by the way, is a document which counsel for the Commission asked me to produce.

The Examiner: Unless there is objection it will be admitted as Respondent's Exhibit No. 13.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 13, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

By Mr. Nixon:

Q. Now, Mr. Goodwin, will you state the names of the voting trustees under the original voting trust agreement made at the time the Rochester Telephone Corporation was organized?

The Examiner: As disclosed by Respondent's Exhibit No. 13.

By Mr. Nixon:

Q. As disclosed by Respondent's Exhibit No. 13, and from your own knowledge.

A. The original voting trustees under the voting trust agreement made in 1921 were Mr. George R. Fuller, Mr. W. Roy McCanne and myself. The voting trustees under the 1926 agreement were the same, but Mr. Fuller died in 1927 and his place upon the voting trust was taken by Mr. J. Foster Warner, who had been a director of the company from its inception, and also a director of the old Rochester [fol. 101] independent company from its organization in 1899. In 1934 Mr. McCanne died and his place was taken by Mr. John P. Boylan who is, and for a number of years has

been, the president of the corporation. So that the voting trustees today are Mr. Foster Warner, Mr. John P. Boylan and myself.

The Examiner: The first voting trust agreement which has been introduced and marked as an exhibit is dated in 1926, is it not?

The Witness: That is correct.

The Examiner: Where is the first voting trust agreement?

Mr. Nixon: I haven't brought that with me. I had the witness state that this present agreement is exactly the same as the previous agreement.

Mr. Roberson: He has not stated that.

By Mr. Nixon:

Q. Is that the fact?

A. I will state that to be the fact.

Q. Did you prepare both voting trust agreements?

A. I prepared both of them.

Mr. Nixon: I can very gladly supply the early one, if you want it.

Mr. Roberson: I was going to suggest that possibly we ought not to go too far in letting the witness tell what is in something that we do not have here. If the Examiner would like to have it I suggest it be furnished and be made a part of the record.

Mr. Nixon: There is not the slightest objection to it.

The Witness: I think Mr. Nixon and I thought we might [fol. 102] save the time of the Commission and counsel.

Mr. Roberson: I have no objection.

The Witness: The two agreements are identical in form except as to the dates and the fact one was made for five years and the other was made for 10 years.

The Examiner: If it is satisfactory to the counsel for the Commission it is certainly satisfactory to the Examiner.

Mr. Nixon: Yes.

The Witness: I might say a word right here with regard to the stock deposited under that voting trust agreement. There was deposited originally 375 shares in the name of Mr. George R. Fuller, 280 shares in my name and 10 shares in the name of Mr. McCanne. That makes 665 shares. Now, when Mr. Fuller died in 1926 his 375 shares were acquired by Mr. McCanne and myself, and when Mr. McCanne died

in 1934 I acquired all of his shares, so that in that way I became the owner of all the voting trust certificates issued under that voting trust agreement. Recently I have given to my wife, Mrs. Goodwin, one-half of those shares of stock, 332 shares, retaining the other 333 in my own name. It was my purpose, and I have already prepared a voting trust agreement similar in all respects to the voting trust agreement which has been offered in evidence, to extend the present voting trust with the same voting trustees for another period of 10 years from August 1, 1936, and if I can control my wife, that will be done.

[fol. 103] By Mr. Nixon:

Q. Now, let me ask you, for the record, whether or not it is the fact that by the agreements and documents which have already been introduced, and by the transactions had which followed those, the main agreement of February 25, 1918 as modified by supplemental agreements was actually carried into effect?

A. It was, and I think without any change in any of the provisions. If there were any changes they were not changes of substance, or not substantial.

Q. The agreements which have been introduced, and the supplemental agreements, constitute the whole story, so far as agreements are concerned, with relation to the organization of the Rochester Telephone Corporation?

A. That is the fact.

Q. Now, I want to ask you some questions with reference to the ownership of stock in the Rochester Telephone Corporation. First I will ask you *you* to whom the preferred stock of the Rochester Telephone Corporati n was issued, and for what consideration?

A. The preferred stock of the Rochester Telephone Corporation, which was provided for in the original agreement of 1918, and provided for in the original certificate of incorporation, was to be $6,900,000. The reason for creating that preferred stock on the terms in which it was set up was that it should be used in the purchase from the New York Company of their properties which were to go into this consolidation. When we finally got the order from the Public Service Commission approving the consolidation, [fol. 104] and approving the price which might be paid for the New York properties, the amount, as determined by the Commission, was $4,814,000, I think, and that amount of

this preferred stock at par, was issued to the New York Company for their properties. There has never been any additional preferred stock issued to New York, or issued to anybody else.

Q. Now, will you tell me to whom the common stock of the Rochester Telephone Corporation was issued?

A. The common stock of the Rochester Telephone Corporation was originally issued to the three individual parties in the main agreement, that is, Mr. Fuller, Mr. Zoller and Mr. McCanne, 665 shares being issued to them, the balance of 335 shares was issued, as provided in the agreement, to the New York Telephone Company. In each case payment was made for the common stock in cash at par of $100 per share.

Mr. Nixon: I am producing and offering in evidence the stock record certified by the Lincoln Alliance Bank and Trust Company, dated December 31, 1935, showing the transfers and ownership of all the common stock of the Rochester Telephone Corporation.

The Examiner: Unless there is objection it will be admitted as Respondent's Exhibit No. 14.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 14, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

By Mr. Nixon:

Q. Now, from that certificate will you state the ownership of all of the common stock of the Rochester Telephone [fol. 105] Corporation from the date of its organization down to the present time?

The Examiner: As disclosed by Respondent's Exhibit No. 14.

Mr. Nixon: And within the knowledge of the witness.

The Examiner: Is it different than Exhibit No. 14?

Mr. Nixon: No, they will be both the same, but I am fortifying it because this man knows about it of his own knowledge.

The Witness: On July 29, 1921, which was within two days of the actual consolidation of the two properties, there was issued the following common stock: To Mr. George R. Fuller, trustee, 60 shares; to Fred C. Goodwin, 10 shares;

to W. Roy McCanne, 10 shares; to Tage P. Sylvan, 10 shares; to the New York Telephone Company, 325 shares, and to George R. Fuller, trustee, 585 shares. That was the original issue of the common stock of this company, and, as I have said, issued for cash. Mr. Sylvan was a New York Telephone Company man. He was a vice president of the New York Telephone Company. He was the man who, more than anyone else, had charge of these negotiations in this transaction for the New York Telephone Company. He was one of the incorporators of the new corporation, and in this certificate of incorporation had subscribed for 10 shares of the stock. So that 10 shares was issued to him, and 325 shares issued to the New York Company. The sum of the two makes the 335 which it was provided that the New York Company should take. The stock issued to Mr. Fuller, to myself and to Mr. McCanne totals 665 shares, which is the balance of the 1,000 shares. Now, [fol. 106] the only transfers which have taken place are the transfer of 665 shares to the voting trustees, and the transfer to the New York Company of the 10 shares of stock which Mr. Sylvan held in his own name. Those are the only transfers of the common stock of the Rochester Telephone Corporation that have taken place.

By Mr. Nixon:

Q. State for the record the present ownership of the 665 shares of the common stock of the Rochester Telephone Corporation.

A. If you mean common stock, I have already stated that. The 665 shares of common stock are owned by the three voting trustees. The voting trustees have issued against that 665 shares of common stock voting trust certificates representing 665 shares, of which I own 333 shares and Mrs. Goodwin owns 332 shares.

Q. And Mrs. Goodwin's name is Marian J. Goodwin?

A. Yes.

Mr. Roberson: In other words, any time she could go up and give away the common stock?

The Witness: No, no. The voting trust agreement provides that you can only get common stock back when the voting trust agreement expires by its terms or may be terminated by the voting trustees.

Mr. Roberson: I see.

By Mr. Nixon:

Q. Now, have there been any changes in the capital structure of the Rochester Telephone Corporation since its organization?

[fol. 107] A. Well, you mean capital stock or bonds?

Q. Yes.

A. There was an increase in the capital stock in March, 1926, the increase consisting of an authorized issue of $5,000,000 of first preferred stock to bear cumulative dividends at the rate of 6½ per cent per year and to be callable at 110. The dividend is cumulative and that preferred stock is prior to the preferred stock originally provided for which went to the New York Company.

Q. What is that stock now called?

A. That stock is called the Rochester Telephone Corporation first preferred stock.

Q. What is the stock which the New York Telephone Company originally got and now hold called?

A. I do not know as anybody ever had occasion to call it.

Q. Is it second preferred?

A. As a matter of fact it is a second preferred. It is subordinate, in all particulars, both as to earnings and dividends, and in liquidation to the first preferred stock. The reason for the issuance of this first preferred stock was we found we needed additional capital. We had a large, much larger than expected, growth, and we issued and sold, roughly, two or two and a quarter millions of this preferred stock.

Q. Were the changes which you have described accomplished by a certificate of increase and classification of capital stock?

A. That is correct.

Q. Dated March 26, 1926?

[fol. 108] A. Yes.

Mr. Nixon: I offer that certificate in evidence.

The Examiner: Unless there is objection it may be admitted as Respondent's Exhibit No. 15.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 15, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

The Witness: Now, that certificate was authorized by the consent of all the stockholders.

The Examiner: In writing?

The Witness: In writing. The certificate so shows. Now, that preferred stock was sold to an underwriting group in the City of Rochester consisting of two of our larger trust companies and two of our large brokerage houses. They bought the stock and distributed it and sold it to the public. I myself conducted all of the negotiations for that sale.

By Mr. Nixon:

Q. Now, I believe you stated you live in Rochester and have lived there for a good many years. Are you a director of some local concerns in Rochester?

A. Yes.

Q. Will you state which ones?

A. Well, I am a director of the Lincoln Alliance Bank & Trust Company, a member of the executive committee of that trust company and of its trust committee. I am a director of the Bausch & Lomb Optical Company, Bausch and Lomb being both German names. I am also a director of the Yawman & Erbe Company, of the Pfaudler Company, of the Stromberg-Carlson Telephone Manufacturing Company. I guess that is enough. I have been a director of [fol. 109] most of those companies a good many years.

Q. Now will you tell us who the present directors of the Rochester Telephone Corporation are?

A. It will help me if I have one of those annual reports, I think.

Q. As you name the men describe who they are.

A. The present directors are 15 in number. There are five named by the New York Telephone Company, as they are entitled to that number, under the agreement, and under the certificate of incorporation. The other 10 are all local men. The local directors are Mr. Raymond N. Ball. Mr. Ball is the president of the Lincoln Alliance Bank & Trust Company, which is one of our larger, if not the largest trust company in Rochester. He is the financial vice president of the University of Rochester and has had charge of their finances for a number of years. He is a director of the Rochester Gas & Electric Corporation,—and I am also a director and a voting trustee of that corporation. I forgot to mention that. He is a director of the Stromberg-Carl-

son Company and Bausch & Lomb Company, and a number of others.

Q. The Stromberg-Carlson Telephone Manufacturing Company?

A. That is correct.

Q. An independent telephone manufacturing concern, is that correct?

A. That is correct.

Mr. John P. Boylan is the president of the Telephone Corporation, the Rochester Telephone Corporation. He also is a director of the Lincoln Alliance Bank & Trust Company [fol. 110] and of the Rochester Gas & Electric Corporation, president of the Rochester Chamber of Commerce, although I believe your term expired December 31, is that correct?

Mr. Boylan: No, not until the 15th of this month.

The Witness: He will be president of the Chamber until the 15th of January. He has been president of the Community Chest, and several other corporations.

Mr. Bernard E. Finucane is director of the Lincoln Alliance Bank & Trust Company, also a director of the Security Trust Company, and he is very active in all matters of public interest in the city.

Mr. Wolcott J. Humphrey is a banker from Warsaw, New York. Warsaw is in our territory, and we have two members on the board who come from outside the city of Rochester. Mr. Humphrey lives in Warsaw, which is in the western part of our territory, and Mr. Wheeler who comes from Canandaigua, which is in the eastern part of our territory.

Mr. Carl F. Lomb is a director of the Bousch & Lomb Optical Company, also a vice president of that company, of the Security Trust Company and of several other concerns in Rochester, notably the Mechanics' Institute, of which he is the president.

Mr. Nixon is one of my partners. We will let you (Mr. Nixon) tell that later, if you (Mr. Nixon) want to.

Mr. John C. Powers is a vice president of the Rochester Trust & Safe Deposit Company, a director of the Pfaudler Company. He was born in and has lived all his life in Rochester. His father used to be one of the prominent bankers in Rochester, a large property owner.

Mr. J. Foster Warner is an architect. He was born in and [fol. 111] is now a resident of Rochester. He is in the neigh-

borhood of 75 years old and has lived there all his life. He was one of the original incorporators and directors of the old Rochester Telephone Company in 1899. He has been with that company ever since, that company and the present company.

Now the other directors, the other five——

By Mr. Nixon:

Q. You only named nine, Mr. Goodwin. I guess I did not count you. Just a moment. Of the ten you have named is it a correct statement that all of them are residents of Rochester except Messrs. Humphrey and Wheeler?

A. Not strictly, because Mr. Finucane lives just a little over the city line, I believe. They are all residents of the territory of the Rochester Telephone Corporation, and all but Mr. Wheeler and Mr. Humphrey live in Rochester, or in Rochester suburbs.

Q. Now, you started to name the other five.

A. Now, the other five directors of the 15 are all Bell nominees. They change from time to time, as there are changes in the personnel of the staff of the New York Company. They are, with two exceptions, men who are in what is called the upstate organization of the New York Company. They are Mr. Wigton, Mr. Lawrence and Mr. Cravens. They are in the upstate organization, with headquarters either at Albany or Buffalo. The other two, one is Mr. Fitzpatrick, the president of the New York Company, the other is Mr. Hubbell, who has been recently made a vice president of the company, and both of them are located in New York City.

Q. Of the 10 local directors, how many of them are now [fol. 112] directors who were directors at the date of the organization of the Rochester Telephone Corporation?

A. Five, I believe.

Q. Which five are they?

A. Myself, Mr. Lomb, yourself, (Mr. Nixon,) Mr. Powers and Mr. Warner.

Q. Now, what other changes on the board, as far as local directors are concerned, have been made since the organization of the company?

A. So far as the local directors are concerned, only as we have had deaths in the board.

Q. And each time there was a death of a local director is it correct to say that a local man was substituted for the one deceased?

A. That is correct.

Q. In the case of Mr. Ball, will you tell us whom he succeeded?

A. Mr. Ball succeeded Mr. Thomas E. Lannin, who was the president of the Lincoln Alliance Bank, and who was succeeded by Mr. Ball in that position.

Q. And whom did Mr. Finucane succeed?

A. Mr. Finucane succeeded Mr. W. Roy McCanne.

Q. Mr. McCanne was connected with what company?

A. Mr. McCanne was a telephone man all his life. He was originally with the Kinloch Telephone Company in St. Louis. He came to Rochester with the old independent company in 1905 and then went with the Stromberg-Carlson Company. So he was in the telephone business practically all his life.

Q. Now, will you tell us the make-up of the executive [fol. 113] committee of the Rochester Telephone Corporation?

A. The executive committee is made up of five in number, and as I have already indicated, without explaining, provision has been made for a cumulative voting in the board, in the election of the executive committee. So that the New York Company is entitled to maintain two members out of five on that executive committee. The committee today consists of Mr. Boylan, myself and Mr. Ball, three local men, and I think Mr. Hubbell and—I do not remember the other one—I think it is Mr. Lawrence.

Q. That is, there is a local majority on the executive committee and has been continuously since the organization of the Rochester Telephone Corporation?

A. That is correct. The executive committee, as a matter of fact has very few meetings. We have a very well attended meeting of the board once each month, and most of the matters that call for action by the board or could be acted upon by the committee are acted upon by the board itself. The executive committee meets very seldom.

Q. Will you state whether or not you own any stock in the American Telephone and Telegraph Company?

A. I do not.

Q. Or in any so-called Bell Telephone Company, or its affiliates?

A. Or any of the telephone companies, outside of the Rochester Telephone Corporation, unless it be the Stromberg-Carlson Company, which is a manufacturing company.

Q. And you are a stockholder in the Stromberg-Carlson Telephone Manufacturing Company?

[fol. 114] A. Yes. I have been for a great many years.

Q. Will you state what bonds have been issued by the Rochester Telephone Corporation from the date of its organization down to the present time, and, so far as you know, the disposition made of those bonds?

A. Well, at first there was an issue authorized of $1,058,000 of bonds, which were set apart as a separate series and called B bonds, which were provided to take care of the bonds of the Rochester Telephone Company. They were authorized for the purpose of an exchange, if the bondholders desired to make an exchange, and there were, from time to time, a number of those exchanges made. The bonds of the old Rochester Company matured in 1933, and with the exchanges which had been made there was left only about $400,000, I think, of that issue. We paid those bonds off out of current funds, and we wiped out the old Rochester bonds and did not have to do any financing for them. The first financing that was done was in a small amount, I do not remember how much. I know we made two or three sales which aggregated three and one-half million dollars finally of 6 per cent bonds. Those sales, in every instance, were negotiated by me and negotiated with a bond house or brokerage house in New York and sold to the public. We had no assistance from the New York Company or any of the Bell Companies in marketing our securities. We haven't at any time.

Now, I think it was in 1928 that money conditions got much easier. We needed some additional money and we had this bond issue of $3,500,000 of 6s outstanding. We sold $5,000,000 in bonds, 25-year maturity with 4½ per cent [fol. 115] coupon, and with the proceeds of that sale paid all the $3,500,000 of bonds which were called Series A, and it left us with about $1,500,000 to take care of extensions and additions to our plant.

That sale was initiated by me in this way: I sent notices to five or six good bond houses. I told them we would like bids on the bonds. We took these bids. It happened to be the Guardian-Detroit Company whose bid was the best, and they got the bonds, paid for them.

There has been only one transaction since that time. We had a number of series B bonds amounting to about $1,500,000, which we funded this last fall. The amount allowed by the Commission was $1,238,000. That is all they said they would allow us to sell, inasmuch as we were getting a premium of at least two points above par. I negotiated that deal and sold the entire amount in one block to the Metropolitan Life Insurance Company.

So that in all the financing that has been done by this Rochester Telephone Corporation since its organization in 1921 we have had no financial help from the Bell Company, or any Bell Company, except at the outset when they loaned us $150,000 to provide working capital, and which was paid back within a few months.

Q. Were those the only bonds that were issued and sold by the Rochester Telephone Corporation?

A. The only bonds we have outstanding today are $5,000,000 of 4½, $1,288,000 of 4s. I think it might be fair to put on the record,—I do not know that it has been mentioned, of course it appears in all the papers, in the main agreement and in the certificate of incorporation,—that the [fol. 116] preferred stock which New York took for its properties to the amount of $4,814,000 will come into voting power if their dividends are not paid, but it does not look to any of us as if there was much chance of that, for we believe that unless we drop very much further behind than we have in our income, that we have a surplus enough to take care of those dividends for a great many years.

Q. How many years did you say?

A. I said a great many years. I haven't figured it out definitely.

Q. The dividends at the rate prescribed have been paid on that preferred stock from the date of the organization of the company?

A. Correct. That is, as prescribed in the agreement and in the certificate of incorporation.

Mr. Nixon: I do not think of anything more with this witness unless the witness himself can refresh my recollection.

The Examiner: If there is no objection we will recess until 12:40. We will recess for one-half hour.

(Whereupon, at the hour of 12:10 o'clock p. m. a recess was taken until 12:40 o'clock p. m. of the same day.)

[fol. 117] Afternoon Session

The Examiner: You may proceed.

Whereupon FRED C. GOODWIN, a witness on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified as follows:

Cross-examination.

By Mr. McDowell:

Q. Mr. Goodwin, you have stated that you are a lawyer and member of the firm of Hubbell, Taylor, Goodwin, Nixon and Hargrave?

A. Correct.

Q. In the city of Rochester, New York?

A. Yes.

Q. Your firm represents the Rochester Telephone Corporation?

A. Yes, and has since its organization.

Q. And on this hearing?

A. Yes.

Q. Were you in Rochester at the time that the original Rochester Telephone Company was incorporated in, 1890, I believe it was?

A. No, 1899. I do not think I was. I do not remember the exact date.

Q. Your firm had nothing to do with the organization of the original Rochester Telephone Company?

A. My firm had all to do with it, that is the firm as then constituted.

Q. You were not a member of the firm at that time?

[fol. 118] A. No, I was not a lawyer until the next year, 1900.

Q. Are you familiar with the setup and corporate organization of the original Rochester Telephone Company?

A. Only because of my connection with the company since.

Q. Prior to the time that the company was purchased by the Rochester Corporation?

A. Well, you see I went into that law office in July, 1900. You see, I have been practicing law nearly 36 years. When I went into the office that company had been organized and I think had just started operations.

Q. The Bell Telephone Company was already operating in the City of Rochester at that time?

A. The Bell Telephone Company of Buffalo had been operating in Rochester from sometime in the 70s.

Q. When you say the Bell Telephone Company of Buffalo you mean what is now the Bell Telephone Company of New York?

A. No, there is no Bell Telephone Company of New York that I know of. There is the New York Telephone Company.

Q. The New York Telephone Company?

A. The Bell Telephone Company of Buffalo was one of the old Bell companies that served the western part of New York State. It was subsequently merged or consolidated into the New York Company.

Q. Do you know of your own knowledge whether or not the New York Telephone Company is wholly owned by the American Telephone and Telegraph Company?

A. I do not know of my own knowledge, but I understand that is so, from records. I think your Moody and other manuals will show that it is. That is all I know about it.

[fol. 119] Q. Well, at that time, or for some years preceding the organization of the Rochester Telephone Corporation and since 1899 the Rochester Telephone Company operated as an independent telephone company in Rochester and adjacent vicinity, or adjacent territory?

A. The Rochester Telephone Company operated as an independent company from its organization in 1899 down to the sale of its properties to the Rochester Telephone Corporation in 1921.

Q. And there was also during the same time an independent company operating in the City of Buffalo and adjacent territory?

A. Yes. That had so many different names from time to time that I could not give them to you.

Q. Both of these companies, though, were in their capacity as so-called independent companies competitors of the Bell Company?

A. Correct.

Q. Is that true?

A. Yes, to a limited extent.

Q. Do you know whether or not the Rochester Telephone Company was successfully operated from a financial stand-

point up to the time of its sale to the Rochester Telephone Corporation?

A. I know it was not.

Q. Why do you say that?

A. Because I was familiar with its affairs and with its finances from about 1909 or 1910 for some years. I know that at the start, and for a few years, they were considered [fol. 120] to be financially successful. I cannot give you the dates but I know that in the later years, and I should say from 1909 on, its common stock, which had been bought originally for $100 a share in cash, sold down to practically nothing, and my recollection is that its bonds were kicking around about 10 or 15. I will not be accurate about those figures, but I know they were very low.

Q. Do you wish to be understood then to say that, for instance, the year or two or three years immediately preceding the sale to the Rochester Telephone Corporation the Rochester Telephone Company operated at a loss?

A. Well, just what do you mean by that?

Q. It did not make any money?

A. At what point? Before bond interest? After bond interest? Before depreciation? After depreciation? At what point are you taking it?

Q. Whether it made a profit.

A. Well, at what point?

Q. After they had paid interest on their bonded indebtedness, of course.

A. I do not recollect about that. How about depreciation? After depreciation? I will answer your question. One of the great difficulties of the Rochester Telephone Company and with all independent companies, was that they did not set up an adequate amount for depreciation. That did not show up at the start, it only appeared after the corporation had been running, say, 10 or 15 years, then it appeared, that the amounts they had been setting aside for depreciation were absolutely inadequate.

[fol. 121] Q. Well, the Rochester Telephone Company had approximately as many subscribers or stations as the Bell Company had in Rochester, did it not?

A. Yes, I think they started off with about the same number. While I do not know how the percentage may have fluctuated I think at the end, in 1921, the number was about

equal, that is, the telephone stations in the City of Rochester.

Q. In other words, they were a real competitor of the Bell Telephone Company, in so far as the local business was concerned, in the territory they covered?

A. Oh, there is no doubt about that. The Rochester Company had the good will of the public of Rochester generally, which I do not think the Bell ever had. They started out, it is my recollection, when they obtained their original franchise from the City of Rochester they did it on the promise that they would not open for business unless they had subscribers for 2,000 telephones, and it is my recollection that at that time the Bell Company in Rochester only had about 1,600 telephones. Now, there is no doubt that from the outset the old Rochester Company enjoyed the good will of the public. It was organized and owned by local men who put their own money into it, and it did have the favor of the public, but one thing that hamstrung the Rochester Company was the rate restriction in their franchise which the city granted them, they were restricted to a maximum rate of $48 a year for a business line, single line service, unlimited day and night. That was another pitfall that the independents fell into, those old flat rates.

Q. Was the Bell Company restricted in any such manner as to rates?

A. No.

[fol. 122] Q. Who fixed the rates?

A. The Public Service Commission. Later the Public Service Commission took jurisdiction of telephone companies, in 1907. From then on the Public Service Commission had jurisdiction to fix the rates.

Q. Did they fix a rate for local territorial service there for the Bell Company which was different than that which they fixed for the Rochester Telephone Company?

A. No, because the Bell did not ask them to. They would have crucified themselves if they had.

Q. The rates were the same then?

A. Yes, they had to be.

Q. From 1907 on?

A. They had to be, as a practical matter. The Rochester Company did its best to get its rates raised, and we even litigated the question to the Court of Appeals. We were beaten on it. They held that the franchise agreement with

the city was absolutely binding and we could not increase our rates above $48 a year with the consent of the Commission or without.

Q. Is there any reason you know why the depreciation of plant equipment of the Rochester Telephone Company should be any different, and any greater than that of the Bell Telephone Company from 1907 on?

A. Speaking theoretically, no, but this question of depreciation is one that is very involved and very intricate. In those days not even the Bell Company knew a great deal about the matter of depreciation. They knew more than the independents did, I will admit, but the Bell Company had money and was rich enough so that it could stand, could [fol. 123] carry through, although their reserves for depreciation were inadequate, but they were all the time setting up as a reserve against depreciation much larger amounts than the independents.

Q. Well then, there is no reason why the Rochester Telephone Company could not and did not operate as suecessfully, from a financial standpoint, during the period from 1907 to 1921, say, as did the Bell?

A. There were several reasons. The principal one was that they could not get additional moneys for additions and extensions to their plants and properties. That meant that they could not get the money to put on additional subscribers.

Q. Well, the subscribers that they had, you say they were about equal, as to the number of stations, to the extent of their operations in their territory?

A. I said they were at the start of that period and at the end of it. What the fluctuations were in between I do not know.

Q. If there was any money lost by the Rochester Telephone Company is it or is it not safe to assume that equally as much was lost by the Bell?

A. Locally I think the Bell lost more, but they had the money to stand it and we did not.

Q. Then it apparently was greatly to the interest of the Bell Telephone Company to eliminate that competition, was it not?

A. No doubt of it, no doubt of it, and also of great interest and convenience to the public of the City of Rochester to have a duplicate system eliminated.

[fol. 124] Q. To have a unified service?

A. Yes.

Q. The Bell System also had to meet the same sort of competition in Buffalo, is that not true?

A. I am not familiar with Buffalo.

Q. Well, they had this independent company there?

A. They had this independent company. They never had the good will of the public of Buffalo to the extent that the Rochester Company did. To what extent the situations were similar I do not know. I know that the Federal was run by a very different kind of men from what Rochester was run. They were more aggressive and more active.

Q. The people of Rochester were, I take it, greatly interested in the local company, the Rochester Telephone Company?

A. They were, for a time.

Q. Do you know approximately what their stock issue was?

A. My recollection is 400,000, maybe 500,000.

Q. Authorized?

A. No, I mean issued.

Q. Do you know what percentage or approximately what percentage of that was common stock?

A. My impression is it was all common stock. I do not think there was any preferred. There may have been.

Q. Have you any knowledge at all as to the ownership of that stock?

A. Why, the common stock which I am speaking about was practically all subscribed for by local Rochester men.

[fol. 125] Q. Have you any idea how many?

A. Oh, a number. I haven't it here but I could give you the list of the original subscribers, and I think it included every man of means that was worth while in a business way in the city.

Q. Did they have any preferred stock issue?

A. I do not think they did. I am not sure about that. I am quite sure they never had any preferred stock.

Q. From the time that it was proposed to form a new corporation to take over the properties of the Rochester Telephone Company were you personally connected with the negotiations?

A. All the way through, Mr. McDowell, right from the beginning.

Q. How did that develop? Where did it originate and how?

A. I could not answer that question, except in this way: Something of the kind had originated back in 1905 or 1906, there was an effort made at that time on the part of the local people at Rochester, headed by Mr. George Eastman of the Kodak Company, to sell the local property, local Rochester property to the Bell. A contract was made with Mr. Fish, who was then the president of the American Telephone and Telegraph Company, and that deal was enjoined by the attorney general of the State of New York, claiming it violated our state anti-trust act. Later, in 1910 or 1911, I do not remember which, I think 1911, we made another effort to sell to the Bell and that was enjoined by our friends in Buffalo.

Q. When you say "we" you mean the Rochester Company?

[fol. 126] A. Well, it was all the Rochester Company in those days, yes, and by "we" I mean the men interested in the Rochester Company.

Q. By the way, were you a stockholder in the Rochester Company?

A. Well, if I was it was only to a very small extent.

Q. How was it first called to your attention? In your capacity as a lawyer, a member of the firm, in a business way or in a personal way?

A. Why, it was called to my attention because I was on the board. I was also general counsel of the corporation.

Q. Of the Rochester Telephone Company?

A. At that time, yes.

Q. Who talked to you about it first, if you recall?

A. I think Mr. Fuller.

Q. Mr. Fuller?

A. Yes. He was the president of the company for a great many years.

Q. Do you recall the substance of that conversation?

A. I would not attempt to state it after all these years.

Q. Well, was there a meeting held about it?

A. There were several meetings.

Q. After he talked to you?

A. Several meetings.

Q. I mean the first time.

A. I do not know when the first time was. I could not remember after all these years. These negotiations covered

three or four years before we got to a contract. Now, what [fol. 127] initiated it and how, I cannot remember.

Q. Well, the Bell Company had endeavored, on two or three occasions to purchase the Rochester Telephone Company?

A. I did not say so. I say we had endeavored to sell to the Bell Telephone Company.

Q. You had endeavored to sell to the Bell?

A. Yes.

Q. And the right or privilege was denied?

A. Well, they got an injunction.

Q. They would not let you do it, the Commission would not let you do it?

A. They got an injunction against us and we never thought it was worth while to attempt to get the injunction set aside.

Q. When was the matter first taken up with the Bell people with reference to the formation of a new corporation?

A. I could not tell you. I should guess sometime around 1915. That would be my best estimate.

Q. By whom was that instigated? By Mr. Fuller of the Rochester Telephone Company?

A. I do not think anybody instigated anything.

Q. Well, somebody had to make the proposition to someone, did they not?

A. I do not know how that came about. I know that Mr. Fuller was the one who, more than anybody else, represented the Rochester Telephone Company and the Rochester telephone group in those negotiations. Now, how they were initiated I do not know.

Q. You do not know whether Mr. Fuller or someone connected with the Rochester Telephone Company made the [fol. 128] proposition to the New York Company?

A. Well, I know this, I know that both the Rochester crowd and the New York crowd knew that this was not a good condition either for the public of the City of Rochester or for the two operating companies, the Bell and the independent, and they got together and talked the thing over. Now, it was after talks of two or three years back and forth that they got to these agreements that have been offered in evidence here. Now, that is all I can tell you about it.

Q. Were you present at the time that the terms of the original preorganization agreements were discussed?

A. I was present on a great number of those occasions.

Q. On that particular occasion were you present?

A. On what particular occasion?

Q. When the terms of the preorganization agreement, as it is here in evidence, were discussed and fixed upon?

Mr. Nixon: You are assuming that that was all done in one day. That is the point.

The Witness: I said I was present on a great many occasions when that agreement, or the provisions of that agreement were discussed. It took probably three years to carry through those negotiations. This agreement which has been offered in evidence here is probably at least the tenth or fifteenth draft of an agreement.

Mr. Nixon: And you are referring now to the main consolidation agreement of February 25, 1918?

The Witness: That is the agreement I am referring to.

Mr. Nixon: You call that same agreement the preorganization agreement.

[fol. 129] Mr. McDowell: The same agreement.

By Mr. McDowell:

Q. Where were these various meetings held?

A. Rochester, New York.

Q. Where in the city?

A. It might be in my office, might be at the telephone office, might be at the hotel, might be in New York at a hotel or at the telephone company, might be anywhere where it was most convenient.

Q. Well, can you state as to who, referring to the Rochester Telephone Company on the one hand and the New York on the other, fixed the terms of that agreement chiefly?

A. I do not think any one man did it in either case. Both agreements were approved by the boards of directors of the respective companies, and until that agreement was approved by those directors its terms had not been fixed and it had not been signed.

Q. Well, the agreement had been drawn?

A. I told you we had drawn probably 15 agreements.

Q. This particular one was drawn?

A. This particular one.

Q. It was drawn before it was submitted for approval to the board?

A. Yes.

Q. Do you recall any of the discussions with reference to the capital stock to be issued?

A. Yes.

Q. How it was determined, as to what the capitalization should be?

A. Yes.

[fol. 130] Q. And how the stock should be classified?

A. Yes.

Q. How was the stock, the amount of capital stock to be originally authorized arrived at?

A. I said in my direct examination there was originally authorized $6,900,000 par value of preferred stock. That was intended to be an amount sufficient to cover the appraised and agreed value and approved value, and by "approved" I mean approved by the Public Service Commission, and the approved value of the plants and properties of the New York Telephone Company which they were to sell to the New Rochester Telephone Corporation. That amount was finally determined by the Commission at just a little in excess of $4,800,000, and that preferred stock was issued to New York for those properties and the entire purchase price of those properties paid in that way.

Q. How did they fix upon the amount of common stock to be authorized?

A. That was a case of having to provide a means whereby the tail could wag the dog, to be perfectly frank about it. So we talked it all out and we agreed we would have a common stock of $100,000, of which we local men should take two-thirds and the New York Company should take one-third, that it should all be paid for at par, $100 a share, but that in order to provide the local men with the money to make the payment for two-thirds the New York Company would pay them for their services $70,000.

Q. Well now, in a $7,000,000 corporation, according to your experience with corporations, is it not rather unusual [fol. 131] that there should be only $100,000 of common stock issued?

A. You know unusual conditions demand unusual remedies.

Q. That was unusual, was it not?

A. What?

Q. That was unusual, was it not?

A. Why, as matters go, yes, but we attorneys are meeting unusual conditions all the time.

Q. The original Rochester Company had all common stock?

A. Yes.

Q. And it was held by all different individuals, business men and so on, scattered all throughout the territory, was it not?

A. Yes.

Q. As you have stated, those people, the citizens there, were very much interested in a local telephone company and very much averse to the New York Telephone Company, isn't that true?

A. Well, as I say, the old Rochester Company enjoyed the good will of the people to a very much larger extent than the Bell Company at that time did.

Q. Was there any discussion at all with reference to the amount of common stock to be issued, as to the desirability of permitting citizens of Rochester to participate, to purchase and hold some of that common stock?

A. That was not feasible.

Q. Why?

A. Because the Bell Company would never, the New York Telephone Company, and very properly, would not put $5,000,000 of their property in the hands of a small [fol. 132] group in the City of Rochester who knew nothing about the telephone business. It would have been suicide for them to do it.

Q. Why?

A. Because those men would not know anything about running a telephone business. That is why this scheme was thought of, so that the Bell Company would know they were putting their properties in the hands of men that they believed were trustworthy and that they knew *knew* something about running the telephone business.

Q. Well, the Rochester Telephone Company was apparently run by a group who knew how to run it well enough to do equally as much business or more than the New York Telephone Company was doing then?

A. Well now, you are opening up a discussion and an argument which I do not think I can argue with you on. I do not think it would do any good.

Mr. Nixon: Let me interpolate a question here. Is it the fact that the same group who were running the Rochester Telephone Company prior to the consolidation also ran the

newly organized Rochester Telephone Corporation after it was organized?

The Witness: The majority of the directors of the new company had been directors of the old. The president was the same, one or two of the vice presidents was the same, and I think the secretary and the treasurer were the same. That is my recollection of it. In other words, the organization of the old company, the old Rochester Company, took command of the new Rochester Telephone Corporation.

By Mr. McDowell:

[fol. 133] Q. Well, then there practically was no change in personnel, so far as the operation of the company was concerned?

A. There was very little change as far as the executives were concerned. There was a very great change as far as the personnel all down the line was concerned, because we had to take on, I should judge, six or seven hundred new employees.

Q. What difference would it have made if there had been a great deal more common stock issued and sold to many individuals in Rochester?

A. Well, I realize that I am only a witness here, but might I inquire what difference can that make? We organized a company 15 years ago. Perhaps we should have done different, but nevertheless we did not. Now, it cannot be changed now.

Q. Well, then the policy, as I might call it, of issuing only $100,000 of stock, or 1,000 shares of common stock, was a provision dictated by the New York Telephone Company, is that not true?

A. It was not dictated by anybody.

Q. Well, they insisted on that, did they not?

A. On what?

Q. There being only $100,000 of common stock issued?

A. No, they did not, they did not. Nobody insisted on it. It was the only thing, the only method that we could see whereby the local group which had been running the old Rochester Company could acquire an interest, a majority interest in stock, voting stock of the new corporation.

Q. Well, you have heretofore stated that the reason for it was the protection of the New York Telephone Company in the investment which they were making there by turning over [fol. 134] their properties.

A. I have said the Bell Company was not willing—and I think they were perfectly reasonable and wise in it—they were not willing to turn over about $5,000,000 worth of property represented by their preferred stock to a group of men, however organized, whom they did not know, whom they had no confidence in as far as their ability to run a telephone company was concerned. Now, they had seen these men operate in Rochester, they knew they had done a fairly good job within their limitations, and they felt content with a fair representation in the new company that those men should have their properties to operate.

Q. Well, I understand that policies of a company are dictated by the directors of the company, are they not?

A. What company are you talking of?

Q. The Rochester Telephone Company.

A. Are you going into ancient history?

Q. I mean the Rochester Telephone Corporation.

A. The Rochester Telephone Corporation, that is correct.

Q. If there were 10,000 shares of common stock and a provision was made that those shares should be placed in a voting trust, the affairs could be handled just the same as they are with 1,000 shares, could not they?

A. Certainly.

Q. Then what difference would it make how many shares of common stock were issued?

A. What would you do? Take 10,000 shares of $100 par value?

Q. $100 par.

[fol. 135] A. You would not change that?

Q. No.

A. Then you say we ought to put up $1,000,000 instead of $100,000 for common stock?

Q. Yes.

A. Well, why?

Q. Why not give the people of the City of Rochester who are so much interested in their local telephone company the privilege of investing in it?

A. Well, you know at that time an investment in telephone stock in the City of Rochester did not look good to any of the public of the City of Rochester. I have explained that in my direct examination.

Mr. Nixon: Was this period shortly after the collapse of the United States Independent Telephone Company?

The Witness: It was before the good people of Rochester had started to forget about that catastrophe. Now, there is a very good reason why that common stock could not have been made $1,000,000 instead of $100,000 and, as you say let the public in. You can only have a voting trust for 10 years. At that time you could only have it for five years in the State of New York. At the end of that five-year period, as the picture then appeared, if we had put out that stock neither we nor the Bell, and God only knows who might control the company.

By Mr. McDowell:

Q. At the time that the original certificate of incorporation of the Rochester Telephone Corporation was applied for it set out the names of the directors for the first [fol. 136] year, did it not?

A. Yes.

Q. How were those directors named?

A. Why, they were named——

Q. Who named them?

Mr. Nixon: That is Exhibit 10 over there.

The Witness: Nobody named them. We got together, talked it over and decided whom we wanted from the old company, and then we asked New York whom they wanted. They gave us the names of five men and their names were put in. I do not remember whether we left anybody off the board of the old company or not, I cannot remember as to that. Now, those men, Mr. Fuller, Mr. Goodwin, Mr. McCanne, Mr. Zoller, Mr. Warner, Mr. Powers, Mr. Lomb and Mr. Lannin I know were all directors of the old Rochester Company. Mr. Sage I think was, but I am not sure, and Mr. Nixon, who is the same Mr. Nixon here, became a director of the new company and was not a director of the old. That is correct, isn't it?

Mr. Nixon: That is correct.

The Witness: Now, the next five that are named are the five who were nominated and named by the New York Company.

By Mr. McDowell:

Q. By the New York Company?

A. Yes.

Q. Now, it also lists those who subscribed to stock?

A. Oh, that is nothing but a formality, you know. You have to have a few subscribers to the stock called incorporators. I do not suppose we lawyers bother with anything like that.

Q. Who was this man Stevens?

[fol. 137] A. He was a Bell man.

Q. He was what?

A. He was an employee of the New York Telephone Company, vice president, I think.

Q. And Mr. Sylvan and Mr. Spaulding were also New York Company men?

A. Yes. Mr. Sylvan was the vice president of the New York Company, Mr. Spaulding was one of the organization in Buffalo, I do not remember what his position was, and there was one other Bell man.

Mr. Nixon: That is on page 9.

The Witness: That is Mr. Jacobs. Jacobs and Spaulding were in the Buffalo office.

Mr. Nixon: You are looking at the directors and he is looking at subscribers.

Mr. McDowell: They are on page 9.

The Witness: I was trying to cover them all. I do not remember how many incorporators we had to have at that time. We did not have them all as incorporators, it was not necessary.

By Mr. McDowell:

Q. There are 9 listed here.

A. Yes.

Q. There is Fuller, yourself, McCanne, Zoller, Warner, Nixon, Sylvan, Stevens and Spaulding. How many of those 10——

A. Nine, isn't it?

Q. Or nine original subscribers for stock ever received any stock?

A. Well, you want to know about the Bell men?

Q. No.

[fol. 138] A. You say nine?

Q. Yes.

Mr. Nixon: Page 9 of the certificate of incorporation.

By Mr. McDowell:

Q. The original subscribers for the stock, the nine who originally subscribed to it.

A. Yes.

Q. Did Spaulding ever receive any of those ten shares of stock which he subscribed for?

A. No. The exhibit shows he never did.

Q. Did he pay for it?

A. I do not know.

Q. Did Stevens ever receive any?

A. No, they did not receive any and they did not pay for any, the New York Company paid for them, of course.

Q. Did Mr. Nixon ever receive the 10 shares?

A. If he did not somebody else did that for him. You mean to say that there is some difficulty because these men did not carry out their subscription agreement? What is the point?

Q. I am just asking you a question.

A. All right.

Q. To whom of those nine original subscribers was any of the stock ever issued?

A. Ever issued?

Q. Yes.

A. I would say to Mr. Fuller, Mr. McCanne and myself, and to Mr. Sylvan.

Q. None of the others ever received any of the stock [fol. 139] for which they originally subscribed?

A. No.

Q. Why not?

A. Why should they? I haven't the papers here. I assume their subscriptions were assigned to somebody else who paid in the money. I know the money was paid in at $100 a share.

Mr. Nixon: To the full extent of $100,000.

The Witness: To the full extent of $100,000, and I have already explained where that money came from.

Mr. Roberson: Mr. Examiner, I wonder if I might be indulged to interrupt at this moment to ask a few questions. The general counsel is sick and I can only be here a short time. There are a few questions that I would like to have brought out on the record and then ask permission to go.

The Examiner: You may proceed.

By Mr. Roberson:

Q. Mr. Goodwin, does your firm have any professional relationship to the New York Telephone Company or the A. T. and T.?

A. None except in odd matters.

Q. You are not local counsel for either company?

A. They do not have any local counsel. Neither of the companies have local counsel in our territory.

Q. Or district counsel?

A. No, not in our territory. They do in Buffalo but they do not in our territory. They did down to 1921, but we never acted for them down to that time. Since then I think we have handled two or three small matters for each com-
[fol. 140] pany.

Q. Incidental, however?

A. Incidental, no retainer, no agreement of any kind.

Q. Mr. Goodwin, I would like to know if there was any discussion, while these negotiations were going on, as to this preferred stock, as to whether it should be callable or not?

A. I do not think there was. If there was I do not recollect it.

Q. Well, it is rather the usual thing, it is not, that the common stockholder would like to have some provision in the preferred stock that it can be retired or called at some price?

A. But you must remember——

Q. Will you answer my question?

A. I was going to answer it in this way: You must remember that callable preferred stock is a matter of quite recent origin. The old preferred stocks, a great many of them, were noncallable. You will find today the United States Steel preferred, which was put out in 1902, I think, if my memory serves me, and there are a number of others, the Eastman Kodak Company has some preferred stock that is noncallable, there are a number of issues, I do not remember any discusion about that feature of this preferred stock, but I think it might well be that about that time we had not gotten to thinking about the callable feature of the preferred stock as prominently as we are today.

Q. Well, there is no way, as a matter of fact, to get rid of this preferred stock except with the permission of the
[fol. 141] New York Telephone Company?

A. No, none that I know of.

Q. And you do not remember that there was any discussion about that?

A. About putting in a call feature?

Q. Yes.

A. No, I do not.

Q. I presume there was some discussion on that feature when you put out the next issue of preferred which you now call the first preferred?

A. Yes, we made it callable at 110, but you see we did not put that out until 1926 or 1927.

Mr. Nixon: 1926.

The Witness: 1926.

By Mr. Roberson:

Q. Now, Mr. Goodwin, I did not gather from your testimony this morning that you called attention to the circumstances under which the preferred stock which was taken over by the New York Telephone Company might vote.

A. Yes, I did.

Q. I thought you only referred to the fact that when certain dividend situations came up that they might have a voice. Are there not certain questions of policy, for example?

A. No, there were no questions of policy. I know exactly what you have in mind. Stated generally, it is this: The preferred stock of the New York Company has no vote upon ordinary, general, current business matters, the election of directors and things of that kind, the management of the corporation, so long as its dividends are fully paid. It has [fol. 142] a vote, along with the common stock, upon matters of large importance. The creation of a mortgage, the sale of the properties as an entirety, the lease of the properties as an entirety, the consolidation or merger of the corporation into other corporations, things of that character it has a vote upon.

Q. In other words, would it be fair to say when it comes to the large financial transactions of the company the preferred stock has a say-so?

A. Now, that depends on how large those financial transactions have to be.

Q. In a mortgage they would have a say?

A. In a mortgage?

Q. In the sale of the property to somebody else they would have a say?

A. Yes.

Q. Of course, the vote of the preferred stock being required——

A. They would outvote us I do not know how many times.

Q. That is of no consequence until it comes to a vote, is it?

A. That is right. Wait a minute. About your large financial transactions: We have had one mortgage on the property, it is what is called an open-ended mortgage. Now, that means it is a mortgage under which bonds may be issued up to a maximum amount, and the amount in this case is $10,000,000, and it may be issued in different series at different times, at whatever rates of interest, for whatever purposes, and so on and so forth, and as the bonds [fol. 143] are paid off and redeemed you still have that maximum limit or ceiling left of $10,000,000 of bonds. Our situation today is that we have outstanding bonds to the extent of $6,200,000 only. I am speaking in round figures. It is $6,238,000.

Q. Which means, of course, you have retired some bonds?

A. Well, we have retired altogether three and one-half, four and one-half, probably five million dollars at one time or another.

Q. Which were held by the public?

A. All of them held by the public. We have never issued any securities to the Bell Company, to the New York Company or to any Bell Company to get their assistance, except possibly at the start when we borrowed $150,000 from them.

Q. I understood that in your direct examination.

A. We have got within our power, without even consulting the New York Company, to issue more bonds to the extent of about $3,900,000. We have a preferred stock authorized of $5,000,000. There is about $2,250,000 in round figures, two and one-quarter millions of that preferred stock outstanding. So we have $2,750,000 of that preferred stock left which we can sell for proper purposes, subject to the approval of the Public Service Commission.

Now, $2,700,000 and $3,900,000 are about $6,600,000 of financing that we have right in our own hands to do, if necessary, and if permitted by the Public Service Commission, without consulting the Bell Company in any way. Of course, it is a matter that has got to go before our board, but we outvote the Bell on the board two to one.

[fol. 144] Q. Now, Mr. Goodwin, let me see if I can get this clear.

A. May I add just one thing to that?

Q. Yes.

A. None of us who are connected with the company in any way can see any possibility, we cannot see by any possibility how there is going to be a need in the future in Rochester, except perhaps in 50 or 100 years and then only in case conditions very radically change, how we are going to have any need for anywhere near $6,000,000 in additional capital.

Q. All right, sir. Now, let me see if I can get this situation straight in my own mind. You had two telephone companies in Rochester when these negotiations were concluded in 1918, the Rochester Telephone Company and the New York Bell Telephone Company?

A. Yes.

Q. Then when the reorganization came about by the organization of the Rochester Telephone Corporation the two physical plants went together?

A. That is correct.

Q. The stockholders who owned the Rochester Telephone Company put in their physical plant.

A. Well, the stockholders approved the transaction.

Q. Well, the property which the stockholders of the Rochester Telephone Company owned went into the merged corporation?

A. It went in at a price of approximately $1,600,000, subject to the mortgage bonds outstanding of $1,058,000.

The Examiner: $1,600,000?

[fol. 145] The Witness: Yes, $1,597,000 was the correct figure.

The Examiner: Plus what?

The Witness: Minus $1,058,000, which were the mortgage bonds outstanding.

By Mr. Roberson:

Q. Then were the stockholders of the Rochester Telephone Company paid something for their stock?

A. Oh, yes, yes. What we did then was to put the Rochester Company into liquidation, into dissolution, wound it up and distributed its assets to the stockholders.

Q. And that only left the bonds of the Rochester Telephone Company outstanding which were assumed by the new corporation.

A. That is correct.

Q. Then the New York Telephone Company made an investment of its physical property for which it took back preferred stock for its part?

A. Correct.

Q. It also paid cash for the 335 shares of common stock?

A. That is right.

Q. And it acted as Santa Claus to three fellows to the tune of $70,000 so they would have some money to buy the 665 shares with?

A. Yes.

Mr. Nixon: I object to that question, if your Honor please, characterizing it as a Santa Claus gift.

By Mr. Roberson:

Q. What is the fact? Was that a straight, bona fide [fol. 146] transaction when they paid the three men $70,000, or was it understood that they were to turn that $70,000 over to be used in paying for this stock?

A. I can show you the agreement.

Mr. Nixon: We offered the agreement in evidence.

The Examiner: I do not think there is any advantage taken by this question. I think it is a fair question. Leave out the word "Santa Claus".

By Mr. Roberson:

Q. As a matter of fact, these three men did not want to put up $70,000 of their own money to buy the 665 shares of stock, assuming that they had it?

A. I doubt very much that they had $70,000.

Q. So the New York Telephone Company, in consideration of services which they had performed for a company in which they were already interested in this merger, it paid to these three men $70,000 with the understanding that that money would be used, that is, $66,500 of it, to buy the 665 shares of stock, wasn't it?

A. That was done pursuant to an agreement which had been made two or three years before.

Q. And the difference of $3,500 presumably belonged to these three men?

A. That is so.

Q. Were they overpaid for their services?

A. I do not think they were.

Q. Were they stockholders of the Rochester Telephone Company?

A. Oh, yes. Not to a large extent though.

[fol. 147] Q. Did the other stockholders get anything of a like nature to the $70,000 that these men had received?

A. The other stockholders did not do any work on this proposition.

Mr. Nixon: Will you permit one question, Judge?

Mr. Roberson: Wait. Let me get through this line, Mr. Nixon, because I am going to leave in a few minutes.

Mr. Nixon: All right, sir.

By Mr. Roberson:

Q. Then, as a matter of fact, outside of the investment which went in from the bondholders of the old Rochester Telephone Company, all the rest of the investment was made by the New York Telephone Company, was it not?

A. Not at all.

Q. It was not?

A. Not at all.

Q. Who else made any except the three men who got the $70,000?

A. Well, I do not know why you limit it to the bondholders of the old Rochester Company.

Q. Because they, as I understand from your testimony, were the only ones that had any property that went into the new merged organization, the old stockholders were liquidating the old company.

A. I haven't testified to anything like that in that order. There was not any liquidation or any distribution to stockholders until long after this deal was put through, of course. There could not be. It was 1922 or 1923 before the old company was liquidated and the stock was paid off. It may [fol. 148] have been longer than that.

Q. Was there property which belonged to the Rochester Telephone Company that did not go into the new corporation?

A. No, no.

Q. Where did the assets come from that were made available for distribution to the old stockholders of the Rochester Telephone Company?

A. Came from bonds of the new corporation I think entirely.

Q. I understood that the bond phase of the transaction was bonds of the old corporation that were taken over by the New York Telephone Company.

A. Oh, no, not at all. The Rochester Telephone Company had a mortgage bond issue amounting to $1,058,000. Those were mortgage bonds secured by a mortgage given to the Rochester Trust & Safe Deposit Company as trustee. Those bonds were held by a great number of individuals and institutions. The deal was, and the agreement so provided, that the properties of the Rochester Telephone Company having been appraised and the price agreed upon should be transferred to the new company subject to the lien of that mortgage and subject to the payment of those bonds by the Rochester Telephone Corporation, which assumed and agreed to pay those bonds. This deal was made in 1921. Those bonds did not mature until October 1, 1933. When they did mature they were paid by the new corporation.

Q. Is that what you meant by the liquidation of the stock?

A. The liquidation of the stock is an entirely different [fol. 149] proposition.

Q. I was trying to find out where the old corporation had assets to be liquidated if it all went into the merged company. What was the nature of the assets?

A. By "liquidation" I do not mean—perhaps "distribution" would be a better word to use—liquidation I do not mean the sale and turning into money of any assets that were not assets of the Rochester Telephone Company which were not transferred to this new corporation. Now, when I say that the old company was then liquidated I do not mean that it had any assets at that time which it could turn into money, or which was necessary to turn into money, except possibly some bonds. They did not have any physical properties, I mean, but they did have some bonds which they had received in payment of the purchase price of their properties over and above the mortgage indebtedness. That amounted to something in the neighborhood of 500 and some-odd thousand dollars.

The Examiner: $539,000, is that right?
The Witness: Yes.

By Mr. Roberson:

Q. That makes it clear. Is that where the distribution of assets came out of then?

A. We had some small amount of cash, I do not remember how much it was, but we had these bonds and I know we distributed bonds in kind to the stockholders as part of the liquidation or winding up of that company.

Q. That clears up the thing that I had in mind. Is this Mr. Zoller in this agreement the Mr. Zoller who used to be [fol. 150] the tax attorney of the General Electric?

A. He used to be the president of the Union Trust Company in Rochester. He is a local man.

Q. Mr. Goodwin, there must be some good reason for doing it or a successful man like you would not be doing it. I am interested in knowing what useful purpose the voting trust served when you owned all the stock.

A. It serves this purpose, that it relieves me of some responsibility. I have not bought that stock of the telephone company as an investment or for the purpose of selling. I have been rather worked into this position because of the death of Mr. Fuller and Mr. McCanne, and I acquired that stock without any idea of selling it and without any idea of making anything out of it except an ordinary, reasonable return. That stock, so long as I live, is never going to go out of my hands. If it did I would have to move out of the City of Rochester, no doubt about that, and I could never come back there and live. So I think it is very important, from my standpoint, that I hang onto that stock. I do not think of the exact details of the plan, but I have a plan worked out for passing that stock along in such a way that that company will be kept independent of the Bell, and one feature of that plan is the continuance of this voting trust. I am going to extend that voting trust for another ten-year period from the first of next August, and I am going to continue the same three voting trustees.

Q. I was just interested in the legal standpoint.

A. I did not go into this thing as a money-making proposition and I am not in it now for a money-making proposi- [fol. 151] tion, but I am in there to keep that company independent.

Q. And in your judgment you will be better able to do that through the means of the voting trust?

A. Well, I think it will take some responsibility off of my shoulders.

Q. Does the Rochester Telephone Corporation participate in the pension plan fund of the American Telephone and Telegraph Company or New York Telephone Company?

A. We have our own.

Q. And it is no part of the general pension plan of the A. T. and T.?

A. It is no part of their plan, and you will see that the agreement, the main agreement provides that we shall set up a pension plan, a benefit plan similar to theirs.

Q. Will you have the same trustee that the New York Telephone Company have?

A. Our own trustee in Rochester, the Lincoln Alliance Bank & Trust Company. The plans are similar. I am frank to say that down to about a month ago we let their committee in New York, which was headed by a Doctor—I do not remember his name—Dr. McSweeney, handled our cases under that plan. We have within the last month taken into our own hands the handling of our own cases in Rochester.

Q. How about your investments in the fund?

A. We have only one investment and that is an investment in the capital notes of the Lincoln Alliance Bank, which I think are good, and the others are investments in our own notes, which we have given to the pension plan under the agreement.

[fol. 152] Q. Who is the trustee?

A. The Lincoln Alliance Bank & Trust Company of Rochester, a trust company of $2,000,000 capital and some $70,000,000 assets.

Q. Where did you get your actuarial statistics for the pension plan?

A. We have gotten those from New York and from some of the life insurance companies.

Q. By "New York" you mean the telephone company?

A. The New York Company, yes.

Q. Is your plan similar to that of the Bell Companies to the extent that the additions to the pension plan are charged to operating expenses?

A. Yes.

Q. In other words, does the employee put up any part of the pension fund?

A. No, the employee pays no part of the expense, the company pays it all.

Q. Does the company pay anything or is it all charged to operating expenses?

A. It cannot all be charged to operating expenses. I do not know what the division of it is. I do know that we appropriate a certain amount, either $75,000 or $100,000 each year.

Q. Out of your surplus?

A. Out of our surplus to take care of the accrued liability down to the date the plan is put into effect.

Q. Is it your understanding that the Bell Company's plan is similar in that respect?

[fol. 153] A. I do not know about that.

Q. I take it that you purchase most of your equipment then from the Stromberg-Carlson Telephone Manufacturing Company?

A. We do.

Q. Is there a TWX service in Rochester?

A. We have got a telephone man to answer that. I do not know what TWX is.

Mr. Nixon: I have got a couple of telephone men here. I do not know what it is.

By Mr. Roberson:

Q. I mean this teletypewriter service that the telephone company furnishes in large metropolitan centers.

A. I do not know about that. You mean the Teletype?

Q. Yes.

Mr. Nixon: We have got two witnesses that know about that.

Mr. Roberson: Will you see to it, Mr. Examiner, that it gets into the record; and what equipment is used for that particular purpose, if any such thing exists in Rochester?

The Examiner: All right. May I ask just one question. Which of the exhibits, if any, disclose when and under what circumstances the preferred stockholders have any voice in the management of the corporation?

The Witness: Well, the certificate of incorporation shows that.

The Examiner: Which exhibit is that?

Mr. Roberson: It is in there, Mr. Examiner.

The Witness: It is in the certificate of incorporation and [fol. 154] it is in the main agreement, both.

Mr. Nixon: It is in Exhibit 10.

The Examiner: All right.

Mr. Roberson: It is in Exhibit 4 too.

Mr. Nixon: It is on page 5 of Exhibit 10, the last paragraph.

Mr. Roberson: You might make this notation, Mr. Examiner, Exhibit 4, top of page 5.

Mr. Nixon: Yes.

By Mr. Roberson:

Q. Mr. Goodwin, my understanding is that the last issue of preferred stock which is callable only has voting power in case difficulties arise about the payment of dividends, or does it ever have any voting power? I am a little confused about that.

A. I do not think it ever has—just a minute.

Mr. Nixon: Have you got Exhibit 15 there?

The Witness: Yes.

By Mr. Roberson:

Q. I am talking about the stock now which is the first preferred.

A. Which is in the hands of the public.

Q. And which is in the hands of the public, as I understand it.

A. Yes.

Q. Your best recollection is,—of course the document itself will show,—the stock has no voting power?

A. It has no voting power at all, only in the case of the passing of a certain number of dividends. It has no right [fol. 155] to vote or get notice of meetings.

Q. And the preferred stock which now you refer to as the second preferred, which was the preferred stock taken over by the New York Telephone Company, that is the stock that has the voting power under certain situations?

A. That is right, and on these major situations you will remember they do not have the right, the controlling vote there, because in these major matters of mortgages, issues of additional stock, and so forth, we have a veto power on them just as well as they have a veto power on us.

Q. Mr. Goodwin, while it is the controlling factor, there is no way for you to do certain of those things unless you get some part of that voting preferred stock voting for the proposition, is there?

A. And there is no way of their doing anything about it without getting some part of our common stock, because none of those propositions can carry without an 80 per cent vote of the common stock.

Q. And how much of the preferred?

A. I do not remember.

Q. Well, some part, it does not make any difference what the percentage would be, because they own it all.

A. The point is all the preferred stock could not carry it against a comparatively small amount of the common.

Q. It does follow then that the New York Telephone Company would have a stock-voting voice in these major transactions we have been discussing?

A. Oh, yes.

Mr. Nixon: You mean in prohibiting?

[fol. 156] Mr. Roberson: That is right, a veto power.

The Witness: Oh, yes. As I say, on those major matters, major items, they may have the veto power on us, but we have also got a veto power on them.

By Mr. Roberson:

Q. Do you recall approximately what price this preferred stock was sold for?

A. Sold at par.

Mr. Roberson: I think that is all I have.

The Witness: We could not sell it for any less under the law.

Mr. Roberson: That is right.

The Witness: We could not get much more than that.

By Mr. Roberson:

Q. What rate does that bear?

A. Six and one-half callable at 110.

Mr. Roberson: That is all I have.

By Mr. McDowell:

Q. Mr. Goodwin, with the exception of yourself no officer or director of the Rochester Telephone Corporation owns any stock at all, is that true?

Mr. Nixon: Common stock or preferred?

The Witness: Technically I do not own any common stock. The answer is "no," except as to the preferred, that is, the first preferred.

By Mr. McDowell:

Q. That is the first preferred?
A. Yes.
Q. But no voting stock whatever?
[fol. 157] A. No.
Q. You say technically you do not own any common stock?
A. That is correct.
Q. Actually you do?
A. No.
Q. Then why does your report to the Commission show that you own all common stock?
A. I do not know that I did report that.
Q. That 665 shares?
A. I do not know that I did.

Mr. Nixon: It is stated that way in our voting trust as reported in the questionnaire, if that is what you refer to.

The Witness: It is more technical than anything else, but the ownership of that stock is in the voting trustees. I am what you started down here to call the beneficial owner of it. However, the voting trustees are the legal owners of that stock.

By Mr. McDowell:

Q. Did you ever pay anything for any of that stock?
A. I did.
Q. How much did you pay for it?
A. $80 a share for some of it. Some of it I did not have to pay for. At the outset Mr. Fuller made me a present of some of that stock. Then I made an agreement with Mr. McCanne and Mr. Fuller, the three of us who between us owned all the voting trust certificate, which represented 665 shares of common stock, that in case any one of us desired to sell or any one of us died the others [fol. 158] should have the option to purchase that stock of the one who wanted to sell or who died. Mr. Fuller died first. Mr. McCanne and I purchased his stock. Mr.

McCanne died next and I purchased his stock. I am misstating things now. I mean the voting trust certificate representing the stock. In that way I became the owner of the entire 665 shares of voting trust certificate.

Q. Originally that stock was all paid for by money which was given or paid to Fuller and McCanne and by them paid into the corporation, that stock was paid for by them with money that was given them by the New York Telephone Company?

A. Exactly, as provided in the agreement.

Q. In other words it did not cost them anything of their own money?

Mr. Nixon: I object to that, if your Honor please. That agreement states the money is being paid in consideration of services rendered. That is not a gift. It represents a purchase for value, and it is all set out in the agreement. There should not be any doubt as to the affect of that agreement. We put in evidence the agreement under which that compensation was paid, and we have shown in our direct testimony that that agreement was submitted to the attorney general along with the other papers. That agreement itself provides that out of the $70,000 to be paid as compensation they should invest $66,500 of it in the common stock of the corporation.

The Examiner: The question was answered, was it not?

The Witness: I think I answered it to the effect that that was carried out exactly as provided in the agreement.

[fol. 159] By Mr. McDowell:

Q. Now, originally there was $6,900,000 of preferred stock issued?

A. No, authorized.

Q. Authorized?

A. Yes.

Q. Excuse me. Of that there was $4,814,000 issued to the New York Telephone Company in payment for their physical properties which were transferred to the Rochester Telephone Corporation?

A. That is correct.

Q. There has been no more of that stock issued, that is true, is it not?

A. Not a dollar's worth.

Q. It is held by the corporation?

A. It has never been issued.

Q. I say it is held by the Rochester Corporation?

A. No, it is not held by anybody. It has never been issued. It is like it never existed.

Q. It could not be issued?

A. Why, it could be issued. As a legal proposition I suppose it could be issued.

Q. The Rochester Telephone Corporation has full power and authority to issue that stock any time they desire, have they not?

A. At not less than $100 a share.

Q. After issuing $4,814,000 of that stock——

The Examiner: $4,800,000.

The Witness: It is $4,800,000 in round figures.

[fol. 160] By Mr. McDowell:

Q. It left unissued how much?

A. $2,100,000 in round figures.

Q. $2,086,000?

A. Correct.

Q. Now, in 1926——

A. Now wait a minute. Before any of that can be issued we would have to obtain from the Public Service Commission of the State of New York the authority to issue it and to sell it, and that would have to be for some proper corporate purpose.

Q. That is so with the issuance of any stock.

A. Any stock or any bonds, yes.

Q. That applies to the first preferred too, does it not?

A. Oh, yes, we have got authority to issue that.

Q. Well, in 1926 when you filed with the Secretary of State a certificate of reclassification——

A. We filed a certificate which had two propositions in it. One was increasing the amount of our authorized capital stock, the other was classifying it so as to create an entirely new issue of preferred stock.

Q. Well, in that reclassification the original preferred stock was classified as second preferred?

A. It was left exactly where it was, except for the fact that the new preferred was put in ahead of it.

Q. Its character was in no respect changed?

A. If you compare the preference provisions with respect to what is now called the second preferred stock you will

[fol. 161] find they are identical with the former provisions with regard to the preferred stock originally authorized.

Q. Now, the new issue authorized of first preferred stock was $5,000,000?

A. Correct.

Q. Of that there has, to this date been issued only $2,282,600?

A. I assume your figures are correct. I know they are approximately correct.

Q. None of the rest of it has been issued?

A. No.

Q. What was the purpose of that issue?

A. Oh, added cash capital to take care of the corporation's financial needs.

Q. Why did you not sell the $2,086,000 of second preferred stock which had not been issued?

A. Because in 1926 you could not have sold that preferred stock for par, being limited to the $5 dividend. That is one reason, and a good one. You could not sell, under the law, that preferred stock for less than par, you could not have sold in 1926 the preferred stock of any utility carrying only a $5 dividend at par.

Mr. Nixon: What dividend does the new preferred carry?

The Witness: Six and one-half.

By Mr. McDowell:

Q. All of it?

A. All that is out, yes, or that has been issued. But the provision is it may be issued in series and carrying either 6 per cent or 6½ per cent dividend, as the directors may [fol. 162] determine.

Q. Now, the second preferred stock, all of which is held by the New York Telephone Company, that has been issued, and the common stock as well, has, at all times, been paid the dividend?

A. I do not know what you mean by "all times." You will recollect that the provision with regard to the dividend on this new second preferred stock provided,—as it worked out and not to state what the provision was in the first place,—that for two and a half years approximately the dividend was not to be cumulative at all and no dividends were paid during that two and one-half year period. Dur-

ing the third year the provision was that the dividends should be cumulative at the rate of 3 per cent per annum, and it is my recollection that that was paid during that year. The provision was also that during the fourth year that dividend should be cumulative at the rate of 4 per cent per annum, and that was paid during the fourth year. I am confident from then on it should be cumulative at the rate of 5 per cent per annum, and I know since that time that dividend has been paid each quarter-year at that rate of 5 per cent per annum.

Now, I do not remember exactly when we began paying dividends on the common stock, but I think it was during the fourth year of the corporation when we were paying four per cent on the preferred stock, because I know there was a time when we paid a 4 per cent dividend on the common stock. Since the preferred has paid 5 we have been paying 5 on the common stock.

Q. Then the dividend on this second preferred stock is [fol. 163] a cumulative dividend?

A. The dividend is a cumulative dividend.

Q. During the first three years that it is supposed to be paid, it is 5 per cent just the same, is it not?

A. Why, not at all, not at all.

Q. Is there a provision whereby during the first and second year there is to be no dividend paid at all?

A. It says the dividend shall not be cumulative. That means that the dividend not being cumulative for the first two and one-half years of the corporate existence, unless a dividend is declared during that time, with respect to that period the holder of that stock is not entitled to any dividend.

Q. Not entitled to any?

A. No. There was no express dividend for the first two and one-half years, but if they had you might say it was non-cumulative, that means it is not payable unless it is declared.

Q. Beginning with the fourth year you paid 5 per cent and have paid 5 per cent every year since that time?

A. Now, wait a minute. The corporation started in business August 1, 1921, so that in that year and 1922 and 1923 we were not obligated to pay any dividends, and did not. Through 1924 we were obligated to pay 3 per cent and we did. Through 1925 we were obligated to pay 4

per cent and we did, and in 1926 we were obligated to pay 5 per cent and we did pay it, and we paid it every year since.

Q. And since that time you have also paid the 5 per cent on the common stock, have you not?

[fol. 164] A. Yes. That dividend on the common stock, you know, the entire year's dividend is $5,000.

Q. Including the $33,500 common stock owned by the New York Telephone Company that company owns stock at the par value of $4,847,500?

A. $4,814,000.

Q. Including the $33,500?

A. Yes, approximately, that is correct.

Q. And 5 per cent dividends on that amount amounts to $242,375 a year, does it not?

A. Well, it is approximately that. I assume your figures are correct.

Q. Now, as against that—that is the investment of the New York Telephone Company, is it not?

A. Correct.

Q. And the total purchase price of their equipment, excepting the common stock which they own?

A. $33,000 cash, except for a small driblet of extensions and additions over the period of a few months there.

Q. Now, as against that, excepting the first preferred which has been issued, there is outstanding only the 665 shares of common stock, amounting, at par, to $66,500?

A. Yes.

Q. Which, over the same period, paid annually 5 per cent dividend or $3,325, is that true?

A. No. What are you going to do with our $6,000,000 of bonds and $2,250,000 of first preferred stock?

Q. I am speaking of the stock issue, the ownership of the stock.

[fol. 165] A. Then what about the first preferred stock?

Q. My question was excepting the first preferred stock.

A. I did not hear that.

Mr. Nixon: Let us have the question read.

The Witness: I did not think that exception was in there. I see what you want. Suppose I state it in this way: The investment in the Rochester Telephone Corporation today is made up of the New York Company's investment of $4,814,000, approximately, in second preferred stock, plus the

$33,500 in common stock. That is the New York Company's investment. Now, the investment of the local men in the common stock, the balance of the common stock, 665 shares, is $66,500. The investment of the public is $2,250,000, in round figures, in first preferred stock, and $6,100,000 and some-odd dollars in bonds. Isn't that what you have in mind?

Q. That is right. Now also, the assured annual income to the New York Telephone Company by way of dividends is $242,375?

A. I take it that your figures are correct. I know they are approximately correct.

Q. As against $3,325?

A. On the balance of the common stock?

Q. On the balance of the common stock.

A. Yes.

Q. Now then, wait a minute.

A. In addition to several hundred thousand dollars on the bonds and first preferred stock.

Q. But the bonds and first preferred stock have nothing [fol. 166] to do with the running of this company, do they?

A. Nothing to do with what?

Q. The running of this company, with the operation of this company?

A. They have everything in the world to do with it, because the moneys derived from the sale of those bonds and of that stock is what permits us to operate.

Q. What voice have they in the operation of the company?

A. None.

Q. What interest, except from the investor's standpoint, have they in the physical assets of this company?

A. If you are talking about a legal proposition, they have no direct legal interest in the physical assets, of course.

Mr. Nixon: Except a mortgage on the entire plant.

The Witness: Which inures to their benefit, and neither has New York, or any holder of the common stock any legal interest in this proposition.

By Mr. McDowell:

Q. Except the power of directing its policies and the operations of the company?

A. Which I do not think would be classed as an interest in the properties. I supposed you were talking about a legal

interest. Your bondholders are interested in the property in the broad general sense they want to see it make money so it will pay their bond interest and pay the bonds at maturity.

Q. The same as any investor in any security is interested in it?

A. Surely.

[fol. 167] Q. Now under what, if any, condition may the New York Telephone Company purchase the 665 shares of the common stock?

A. Well now, I suppose I was called as a witness, not as a prophet. So far as I am concerned there are no conditions under which they can purchase them.

Q. Referring to Exhibit 5?

A. Yes. There is a provision in there that if the proposition is a failure and if the local individuals want to sell to the Bell, to the New York Company, they will buy at 50 cents on the dollar. That is correct, is it not?

Q. That is correct.

A. That is entirely optional with the local men.

Q. That is right.

A. It gives the New York Company no rights whatever, and I do not believe that that provision is in effect today. It is 15 years old.

Q. There is nothing to prevent the holder of this 665 shares of stock from disposing of it to the New York Bell Telephone Company if they want to, is there, or offer it to them?

A. No, no legal objection to it, but as I have already said, if I should do it I should prepare to leave Rochester for good and all.

Q. If you should unfortunately leave the community, suppose you should die, what is to prevent someone from offering that stock to the New York Telephone Company?

A. I have already said that I think I have a scheme devised which will prevent that, and so far as it is humanly [fol. 168] possible to do it I shall do it.

Q. It is possible that it could be done?

A. Certainly, certainly, I could do it today. I will agree with you as to the possibilities.

Mr. Nixon: Just a moment. Pardon me. Is it not a fact that *that* this Commission would have to approve the acquisition of such stock by the Bell Telephone Company since

the Bell Company is under the jurisdiction of this Commission?

The Witness: Do not ask the witness that because I do not know.

Mr. Nixon: I am asking counsel that.

Mr. McDowell: That is aside from the issue.

Mr. Nixon: That is very important. You are talking about the possibility of the Bell acquiring that stock. I want to point out that this Commission has the power to stop it if it wants to.

Mr. McDowell: Or disposing of it to someone outside of the Bell who is friendly to the Bell?

Mr. Nixon: Are we talking about actual control of this company now or the possibility of the control passing away in the future sometime to somebody else? I had supposed that we were directing this inquiry to where control lies at the moment.

The Examiner: That is the issue.

Mr. Nixon: Here is a witness that says he has control, he does not intend to part with it. It seems to me what might possibly might happen 20 years from now is wholly immaterial. I have no objection to this witness stating any plans he may have for disposing of the stock on his death. It [fol. 169] seems to me that is as far as we should go.

The Witness: I have already stated part of it. I might as well state the rest. I have planned to extend the life of this voting trust, that means making a new voting trust for the limit of time permitted by the New York State laws, which is 10 years. I plan to put the same stock back into the hands of the same voting trustees who own it and control this voting power now. I plan to, in some way or other, if conditions do not change, pass on the ultimate and beneficial ownership of that stock to my oldest son who has been with the company for five or six years and is its secretary. That is the only feasible and practical method that I know of, of retaining the control, and retaining it as it should be retained, for the good of the organization and for the public of the City of Rochester.

By Mr. McDowell:

Q. Now, with reference to this second preferred stock, it is also provided, is it not, after payment of dividends on the second preferred stock, that is 5 per cent and accu-

mulations, the common stock may receive and be paid a dividend not exceeding 5 per cent?

A. That is correct.

Q. Then if there is any surplus profits remaining such preferred stock shall participate and share pro rata, with the common stock in any further dividends up to 3 per cent additional?

A. That is correct. It would mean that in order for me to acquire an extra dividend in any one year of $3,300 the company would have to pay the New York Company an extra [fol. 170] $50,000, which is not in contemplation by anybody.

Mr. Nixon: And has it ever been done?

The Witness: Never.

By Mr. McDowell:

Q. It also provides, does it not, that in the event of insolvency or dissolution of the Rochester Telephone Corporation the second preferred stock shall, upon distribution of the assets, be repaid to the full extent of its par value before the common stock is paid or receives anything?

A. That is correct.

Q. And then shall share prorata with the common stock in any surplus assets remaining after the common stock has been paid to the full extent of its par value?

A. That is correct. That is the common provision of preferred stocks.

Q. There is also a provision, is there not, that in case of dissolution the first preferred stock is entitled to receive only the par value, plus the earned dividend up to the fixed per cent that is provided for?

A. I do not remember about that, whether they are entitled to their premium of 10 per cent or not. I do not remember, but you are absolutely right, that in case of any dissolution, after the bonds are taken care of, which are an obligation, the first preferred has got to be paid off first, the second preferred has got to be paid off second, before anything is coming to the common stock.

Q. After that, if there are any other assets——

A. After that, if there are any assets they are to be shared prorata, share for share, between the second pre- [fol. 171] ferred and the common.

Q. And the first preferred does not share at all in that excess?

A. No, no, it never does. You are right. On dissolution or winding up the first preferred is entitled only to its par value plus any unpaid dividends.

Q. The voting trust agreement provides, as to the election of directors, that no one shall be elected a director who has any interest in or is in any way connected with the New York Telephone Company?

A. Well, the voting trust provides that the voting trustees shall vote to elect 10 of the 15, no one of whom shall be in any wise connected with the New York Telephone Company.

Q. Except the New York Telephone Company directors?

A. Yes, your voting trustees, but in addition to that the provision in the certificate of incorporation for cumulative voting gives them the power to elect, by virtue of their own stockholding and nothing else, one-third of the directors and no more.

Q. Do you know whether or not any director of the New York Telephone Company now holds, or has at any time held any shares of the stock in the American Telephone and Telegraph Company or the New York Telephone Company?

A. Any director of the Rochester Corporation?

Q. Yes.

Mr. Nixon: You said New York Telephone Company.

The Witness: You said New York Telephone Company.

By Mr. McDowell:

[fol. 172] Q. Pardon me. I mean the Rochester Corporation.

A. Why yes, I know that Mr. Boylan owns a few shares of A. T. and T. I would like to myself, but I haven't any at the present time.

Mr. Nixon: Just a minute, Mr. Goodwin. That is not correct. Mrs. Boylan, I guess, owns it.

The Witness: It is Mrs. Boylan, is it?

Mr. Nixon: Yes.

The Witness: All right. I imagine, although I know nothing about it, that Mr. Lomb, Mr. Warner, Mr. Powers, who are all men of large means, might likely have some A. T. and T. stock in their portfolio, but I know that they are not interested in A. T. and T. to any such extent that it would influence their action upon the board of directors of the Rochester Company.

By Mr. McDowell:

Q. However, they are interested to the extent of their stock ownership at least?

A. Let us get down to brass tacks. How many shares are there of A. T. and T. outstanding? Several million. I should be very much surprised if any one of these men had over 100 or 200 shares.

Mr. Nixon: Have you recently looked up the number of outstanding shares of the A. T. and T. Company?

The Witness: I think I did the other day.

Mr. Nixon: And A. T. & T. has in excess of a million shares?

The Witness: Considerably in excess of a million shares.

Mr. Nixon: Nearly two million shares?

The Witness: Kodak has got two and one-half million. [fol. 173] Swift & Company has got six million. I do not know what A. T. and T. has got. They have got a lot of stock.

By Mr. McDowell:

Q. In your opinion is any person who holds stock in the American Telephone and Telegraph Company interested in the success of the operation of that company?

A. Of course, they are in a broad, general way. As I say, I know their interest by virtue of that stock ownership is not sufficient to influence the vote or the decision of any of those men.

Q. As a matter of fact that is an opinion, is it not?

The Examiner: That is what you asked for in your question.

Mr. McDowell: Yes.

The Witness: Well, I have observed those men in action for over 25 years and I think I know.

By Mr. McDowell:

Q. By the preorganization agreement the territory to be occupied by the Rochester Telephone Corporation is expressly limited, is it?

A. Yes, very definitely.

Q. And it may be extended?

The Examiner: Are you asking about some exhibit that is in here?

Mr. McDowell: I asked him with reference to that.

The Examiner: If you are going to ask a question on some exhibit that is here, why you can ask him the question instead of having him repeat something that is already in evidence.

Mr. McDowell: No, no.

[fol. 174] By Mr. McDowell:

Q. May that territory be extended by the Rochester Telephone Corporation?

A. Well, I do not think so, without the consent of the New York Company. You see, we had a territory there that Western New York was completely covered. I do not mean by that that we had all the stations that might be used, but the whole territory was covered, and it was for that reason that the lines of demarcation of our territory were drawn very carefully and very exactly. The same thing was done in Jamestown, and we have both held to that. If we have the power, which I doubt, to extend into their territory, so-called, they certainly have the power to extend into our territory. I think we have both kept on our own side of the bed so far.

Q. Well, you have contracts with the New York Telephone Company which limits the scope of your operations, is that not true?

A. No, I do not think so, except as such may be included in some of these contracts which are presented here. I think the only agreement of any importance that we have with the New York Company is the ordinary toll agreement. You see, we have very few long distance lines and they have a great many. We have to look to New York and to A. T. and T. for our long distance service.

Q. Have you any contract of any kind with the A. T. and T.?

A. I think not, but you better ask Mr. Boylan about that. He is a telephone executive and I am not. I can say this, however, that we have no management contracts or en-
[fol. 175] gineering contracts or construction contracts, or anything of that kind with A. T. and T. or New York, either one.

Q. Has there ever been any situation arise which required the consent of 80 per cent vote of the common stock?

A. You mean under the provisions of the certificate?

Q. Yes.

A. No.

Q. Never has?

A. Never has.

Mr. Nixon: Or any in contemplation?

The Witness: None whatever. That is, we do not contemplate, we see no reason to expect that we shall have any new mortgage, or that we shall want to consolidate with anybody. As a matter of fact there isn't anybody to consolidate with, except New York, in our territory.

Mr. Nixon: Or lease their plant?

The Witness: Or lease, or any of those major operations which are specified and which require the vote of not only a majority of all the stock, but of 80 per cent of the common stock,

By Mr. McDowell:

Q. Did not the authorization for the issue of this first preferred stock, or reclassification of the stock, require that 80 per cent?

A. Yes. We readily got the 80 per cent. If you examine the instrument you will find it is signed by the New York Telephone Company and by the voting trustees as the holders of all the stock of the Rochester Telephone Corporation.

[fol. 176] Q. Since 1921 the Rochester Telephone Corporation has acquired the physical properties of other telephone companies, has it not?

A. Some very few, small companies, yes.

Q. That were consolidated with the Rochester Company?

A. Speaking generally and not in technical, legal terms, yes; because they were not statutory consolidations. There were a couple of statutory mergers, as I recollect.

Q. There were consolidations, were there not, which required the consent of the New York Commission?

A. Of the Commission, yes, of the Public Service Commission.

Q. Yes.

A. That is so.

Q. Does not the consolidation of any company with the Rochester Corporation require the consent of the New York Telephone Company?

A. Not at all.

Mr. Nixon: It is the other way around.

The Witness: If you are speaking about a technical, legal consolidation, yes, but we have had no legal consolidation. By "legal consolidation" I mean a strict consolidation procedure, a transaction authorized by our corporation laws.

Q. Well, in 1931 you acquired the properties of the Perry Telephone Company, did you not?

A. Yes.

Q. It was consolidated with the Rochester Telephone Corporation, was it not?

A. It was, speaking very generally.

[fol. 177] Q. And it was so authorized to be consolidated by the New York Commission?

A. No.

Mr. Nixon: Just a moment. If your Honor please, I handled that transaction myself and we were authorized to acquire the stock of that company, the Perry Telephone Company.

The Witness: I will tell you all about Perry. The Rochester Telephone Company acquired all the common stock of Perry and then, as it was expressly authorized to do by the corporate laws of the State of New York, it filed a certificate of merger, merging the Perry Telephone Company into the Rochester Telephone Corporation. That automatically passed over to the Rochester Telephone Corporation all the properties and all the franchises of the Perry Company, subject to all their indebtedness, and required no action whatever upon the part of the stockholders of the Rochester Telephone Corporation.

Mr. Nixon: One more question. Was that transaction approved by the New York State Public Service Commission?

The Witness: Yes, it was. I think we have handled one or two other small situations.

By Mr. McDowell:

Q. I hand you a report of the Public Service Commission of New York for 1931, Volume 1. On page 51 I would like you to read into the record what is stated there.

A. No, no, you can read it into the record.

The Examiner: In view of the fact that this witness is anxious to get away you better ask him a question about it.
[fol. 178] Mr. Nixon: I haven't seen it. I do not know whether I will object to it or not.

The Witness: I will read it. "Consolidation of public utility corporations in the State of New York. During the year 1931 the consolidation of public utilities in the State of New York has continued, either through the purchase of property or of capital stock, the principal acquisitions authorized being as follows:"

By Mr. McDowell:

Q. Now, on page 52 it refers to Rochester.

A. Yes, the Perry Telephone Company by property purchased.

Q. It refers to the Rochester Telephone Company?

A. Yes.

Q. As a consolidation authorized, does it not?

A. I am telling you, as an attorney of the State of New York for 36 years, and having had a great deal to do with corporate deals, that what they meant by "consolidation" is not a statutory consolidation, it is a general term as used here to indicate the acquisition by one corporation of substantially all the properties and assets of another, and that is perfectly apparent, that that is what is meant here, the consolidation by the Rochester Telephone Corporation of the Perry Company is expressly said to be by property purchased. Now, the fact is that it was by a merger, and that is a statutory procedure.

Q. That property could be purchased and still be owned by the Rochester Telephone Corporation without there being either a merger or consolidation, could it not?

[fol. 179] A. Yes, but not without the consent of the Public Service Commission.

Q. If they did purchase it and that company went out of business and its entire physical properties were absorbed into the Rochester Telephone Corporation why would the Public Service Commission of New York term it as a consolidation, if it meant something else?

A. Well, I do not agree with you at all, because I say that the statement in that report shows right on its face that they did not mean a consolidation, which is a statutory proceeding expressly provided for by the statute. They use the

word "consolidation" in its generally accepted sense of putting two properties or two things together, and there are at least three methods of doing that, by statutory consolidation, by statutory merger and by a purchase and sale.

Q. Do you know how many properties of other companies the Rochester Telephone Corporation acquired during the years 1922 to 1932, inclusive?

The Witness: Have you a record of that here, Mr. Boylan, of how many telephone operating properties we have acquired since 1922? They would not be over five, would they?

Mr. Boylan: No, four or five.

The Witness: Four or five.

Mr. McDowell: Has he a record on that?

The Witness: Have you a record here on that?

Mr. Boylan: I can recall from my own memory.

The Witness: It would not be over four or five. Those proceedings have all passed through our office, and I am [fol. 180] sure it would not exceed four or five.

Mr. Nixon: The principal one is the Perry Telephone Company.

The Examiner: Were those properties acquired from the New York Telephone Company?

The Witness: No, none of them.

Mr. Nixon: Were they being operated by the New York Telephone Company at the time?

The Witness: No, they were not. They were small, independent properties.

The Examiner: Has counsel for the respondent any question to ask while the Commission counsel is looking at something?

Mr. Nixon: I think I have no more questions.

By Mr. McDowell:

Q. As to the executive committee, will you explain the power of the executive committee more in detail?

A. The power of the executive committee is stated in the by-laws. I do not remember exactly how it is stated. The usual way of stating it is that the executive committee shall, in the interval between directors' meetings have all the powers of the board itself.

Q. That is in the by-laws, Exhibit 11?

A. I think it is in the certificate of incorporation. You will find it in the certificate of incorporation, Exhibit 10, page 7. That has a provision for cumulative voting. Now, in the by-laws you will find the provision as to their powers, which reads as follows: It is Article 14 in Exhibit 11.

"Subject to such limitations and regulations as may be [fol. 181] prescribed by the by-laws or by the board of directors, the executive committee shall have and exercise all the powers of the board of directors in the intervals between the meetings of the board, other than the powers to appoint a chairman of the board of directors, or fill any vacancy or vacancies occurring in the board of directors."

That is a very customary provision in our state.

Q. The following article, Article 15, provides that "A majority of the members of such committee shall be present to constitute a quorum, but no action of the committee shall be effective unless concurred in by a majority of the entire committee."

A. That is correct.

Q. The executive committee is appointed by the board of directors, is it not?

A. Yes.

Q. You are chairman of that executive committee?

A. I believe so.

Mr. McDowell: I believe that is all.

By Mr. Nixon:

Q. The make-up of this executive committee is three local men and two men nominated by the New York Telephone Company?

A. Yes.

Q. It has always been so constituted?

A. Yes.

Q. And is at the present time?

A. Yes.

Mr. Nixon: That is all.

[fol. 182] The Examiner: We will take about a three- or four-minute recess.

(Whereupon a short recess was taken.)

The Examiner: You may proceed.

Whereupon JOHN P. BOYLAN, a witness called on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Nixon:

Q. Your name is John P. Boylan?
A. Yes, sir.
Q. You reside where?
A. In the City of Rochester, New York.
Q. And what connection do you have with the Rochester Telephone Corporation?
A. President and general manager.
Q. When did you first become connected with the Rochester Telephone Corporation?
A. 1921.
Q. On what date?
A. First day of August.
Q. Was that when the corporation began business?
A. I believe so.
Q. You have continuously, since that date, been associated with the Rochester Telephone Corporation in some capacity?
A. Yes.
Q. At the organization of the company in August, 1921, [fol. 183] what was your connection with the Rochester Telephone Corporation?
A. Vice president and general manager.
Q. When did you become president?
A. In 1927.
Q. And that was on the death of Mr. Fuller?
A. Yes, sir.
Q. Prior to the time you became connected with the Rochester Telephone Corporation on August 1, 1921, will you state briefly your telephone experience?
A. I began with the Cleveland Telephone Company in Cleveland, Ohio, in 1892. I was with it, I was with that company for 11 years. I went with the Cuyahoga Telephone Company following that for a period of four years. From there I went to the Detroit Home Telephone Company,

Detroit, Michigan, and was with them for two years. The next four years I was a consulting telephone engineer having offices in Cleveland, Ohio. From there I went as vice president and general manager to the Mountain Home Telephone Company in New York with headquarters in Plattsburg. I was in that position for nine years. That brings us up to 1921, when I came with the Rochester Telephone Corporation.

Q. Is it fair to say that for upwards of 30 years you have been connected with independent telephone companies either as operator or as engineer?

A. Thirty-three years, to be exact.

Q. Are you a director of any telephone associations?

A. I am a director of the United States Independent Telephone Association, and I am a director of the New York [fol. 184] State Telephone Association, which is an association comprised of independent operating companies.

Q. In New York State?

A. In New York State, and I am also president of the latter organization.

Q. You knew Mr. Fuller in his lifetime, of course?

A. Yes, I knew Mr. Fuller very well.

Q. You succeeded him as president of the present Rochester Telephone Corporation, is that correct?

A. Yes.

Q. Will you state Mr. Fuller's connection with the independent telephone business in Rochester for as many years as you know about?

A. I believe Mr. Fuller entered the telephone business in Rochester in 1898 as one of the founders of the Rochester Telephone Company. I believe he occupied the position as secretary and treasurer until 1921, when that company was taken over by the Rochester Telephone Corporation. Mr. Fuller was the director of the United States Independent Telephone Association. He was president of the New York State Telephone Association, and he was president of the National Independent Pioneers Association.

Q. Any others?

A. That is all I remember.

Q. Are you the officer of the Rochester Telephone Corporation who signed the questionnaire sent out by this Commission on its amended form 1A450?

A. I am.

Q. And were the answers given to the questions in that [fol. 185] questionnaire and the information which accompanied that questionnaire correct and true as of the date when it was filed?

A. To the best of my knowledge, I believe.

Q. And was that answer and the information supplied with it prepared under your direction?

A. Yes, sir.

Q. And verified by you as true?

A. Yes, sir.

Mr. Nixon: I may be out of order, but I am quite willing to offer in evidence the questionnaire that this company has already signed.

Mr. McDowell: I have a certified copy, if you want it.

Mr. Nixon: I will offer it in evidence. I think it is probably a part of the record here. If you consent I will now offer in evidence a certified copy of the questionnaire, answers and information supplied by the Rochester Telephone Corporation to this Commission on its amended form 11450.

Mr. McDowell: Together with a copy of the letter of transmittal accompanying it?

Mr. Nixon: All right.

The Examiner: If there is no objection it may be admitted as Respondent's Exhibit No. 16.

(The document referred to was received in evidence, marked "Respondent's Exhibit No. 16, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

Mr. Nixon: I offered the last exhibit together with a letter accompanying the same which is dated January 3, 1935, signed by Mr. Boylan and directed to the Secretary of this [fol. 186] Commission.

The Examiner: All right.

By Mr. Nixon:

Q. Now, Mr. Boylan, are you able to state the amount required for the payment of dividends on all preferred stock per year at the rates prescribed in that stock?

A. $389,069 per year.

Q. Will you state whether or not dividends at the rates prescribed in the various classes of stock as covered by any

agreements affecting those issues have been paid continuously since the organization of the corporation, with the exception of the first three years as stated by Mr. Goodwin?

A. They have been paid continuously.

Q. So that there is now no default on any class of stock issued and outstanding by the Rochester Telephone Corporation?

A. No.

Q. Have you a statement of the company's surplus earnings account as of December 31, 1935, or some recent date?

A. I have it for December 1, 1935. That is the latest.

Q. What is the amount of surplus as of that date?

A. $1,298,490.

Q. Have you made any computation as to the number of years for which the company will be able to pay dividends on its preferred stock, without regard to its earnings for future years, out of that surplus?

A. I made a computation, not including the year 1935.

[fol. 187] Q. What was the result?

A. During the last three years, that is, including 1934, the Rochester Telephone Corporation has operated at a loss. Assuming earnings equal to the average of the past three years, however, it is my opinion that the Rochester Telephone Corporation will still be able to pay dividends on both issues of preferred stock at the rate prescribed for at least the next 40 years, and possibly longer.

Q. Now, what is the experience of the Rochester Telephone Corporation with respect to earnings prior to the three years you have just testified to, whether or not it operated at a loss?

A. No, we operated in so-called black figures previous to that time.

Q. And assuming operating conditions no worse than have been encountered in the past three years, it is your statement that it is possible to pay dividends on both classes of preferred stock for a good many years?

A. Forty years and possibly longer. It will be longer for the reason that 1935 will show black figures whereas the preceding three years we have lost an average of perhaps $40,000 a year.

Q. Now, will you state whether or not to your knowledge the Rochester Telephone Corporation has any intention to consolidate with any other telephone company?

A. No.

Mr. McDowell: That is objected to.

The Examiner: What is the question please?

Mr. Nixon: The question was whether or not the Roches-
[fol. 188] ter Telephone Corporation, to the knowledge of this witness, had any intention of consolidating with another company, and my purpose is I wish to negative the implication that it may be possible to do any of these acts. It may only be done at the request and consent of 80 per cent of the stockholders. These are the acts which Mr. Goodwin testified to as being major operations, which can only be done with the consent of the New York Telephone Company. My purpose in this and future questions which will follow is to indicate that the company has no intention of doing any of the acts as to which the so-called veto power applies.

The Examiner: He may answer the question.

Mr. McDowell: Your Honor, I object to the question for the reason that on its face his opinion is worth nothing. It lies exclusively with the action of the board of directors and in conjunction with the action of the New York Telephone Company whether they did or not, or whether they ever wanted to or not. This witness cannot say at all in his opinion whether they wanted to consolidate.

Mr. Nixon: This witness is the president and general manager of the Rochester Telephone Corporation and I think I have a right to ask him whether or not any of these alleged prohibitory acts are in contemplation either by him or by anybody else.

Mr. McDowell: Unless he knows.

The Examiner: The answer must be in so far as he knows.

Mr. Nixon: That is right.

The Examiner: He may answer the question for what it is worth.

[fol. 189] The Witness: My answer was "no."

By Mr. Nixon:

Q. Now, will you state whether or not to your knowledge the Rochester Telephone Corporation intends to change its capital structure in any way, or whether or not you, as its president and general manager, intend to recommend any change in its capital structure in any way in the future?

Mr. McDowell: I object to that.

The Examiner: You have got two questions in one there.

Mr. Nixon: I will divide them up and make two questions out of it.

By Mr. Nixon:

Q. Do you know whether or not the Rochester Telephone Corporation intends to change its capital structure in any way in the near future?

The Examiner: Do you know? The answer is "yes," I take it?

The Witness: Yes.

By Mr. Nixon:

Q. Does it or does it not contemplate any such changes?

A. It does not contemplate any such changes.

Q. Do you, as its president and general manager, contemplate recommending any changes in the capital structure of the corporation in the immediate future?

A. I have no intention of making such recommendations.

Q. Do you, as its president and general manager, intend to recommend in the future that the corporation, the Rochester Telephone Corporation, guarantee the bonds of another corporation?

[fol. 190] Mr. McDowell: That is objected to.

Mr. Nixon: That is the same line of questions exactly.

The Examiner: Let us not carry it too far.

Mr. Nixon: There are certain acts that are set out in our certificate of incorporation that may not be done except with the consent of 80 per cent of the stockholders. Now, I am going to try to show we have no intention of doing any of those prohibitive acts.

The Examiner: As far as he knows the company does not intend to do anything.

By Mr. Nixon:

Q. Is that correct?

A. That is correct.

The Examiner: That is as far as he can go.

By Mr. Nixon:

Q. Now, is the change in the capital structure which was made in March, 1926, that is the reclassification of the stock, the only change that has ever been made in the corporate structure of the Rochester Telephone Corporation, to your knowledge?

A. It is.

Q. Do you know whether or not any alteration of amendment of the certificate of incorporation of the company is contemplated, so far as you are concerned?

The Examiner: He has answered that question in the general question.

Mr. Nixon: All right.

By Mr. Nixon:

Q. Now, will you state with regard to the board of direc- [fol. 191] tors of the Rochester Telephone Corporation, the total number of that board?

A. Fifteen.

Q. How many of those are local men, by which I mean residents of Rochester or its environs?

The Examiner: Unless his testimony on these matters is going to be different than the previous witness it is just repetition.

Mr. Nixon: It is not repetition, Mr. Examiner. It is going to be cumulative.

The Examiner: Why go into that unless counsel for the Commission questions the testimony of the previous witness on these matters? I do not see any need for it.

Mr. Nixon: I am going to carry this feature further than Mr. Goodwin went, but I do not want to unnecessarily lumber up this record.

The Examiner: All right.

By Mr. Nixon:

Q. How many of those men are representatives of the New York Telephone Company?

A. Five.

Q. Have you made some study of the records of the corporation for the purpose of determining the attendance of the directors representing the New York Telephone Company, in comparison with the attendance of the local or Rochester directors at meetings of the board of directors from the date of the first meeting of the borad of directors of the corporation down to the last meeting of that board in December of 1935?

[fol. 192] A. I have made such a study.

Q. Will you state what it shows with reference to the average attendance of the directors representing the New

York Telephone Company as compared with those of Rochester or its environs?

A. This exhibit which I am presenting is an attempt to show, as far as such showing can be made, numerically that the New York Company has not attempted to exercise any control——

Mr. McDowell: I object to that as a conclusion of the witness.

Mr. Nixon: It is a description of his exhibit. I have got this in form to put in here if you want it in, or if you will let the witness state it, if you do not want to lumber up the record with any more exhibits, we can have him state it.

The Examiner: The statement is in there.

Mr. Nixon: He said the purpose of the exhibit was to show thus and so.

The Examiner: You can offer in evidence as to what actually happened. I am going to make an effort to determine, as the result of this evidence, whether or not the control is really exercised by the New York Telephone Company or the A. T. and T. over this company. This witness cannot qualify as an expert on control. If he could that answer might be given.

Mr. Nixon: Note an exception.

The Examiner: The exception is noted.

By Mr. Nixon:

[fol. 193] Q. Mr. Boylan, you may not state what the purpose of the exhibit is, but you may tell, from your investigation with respect to the attendance in the first year of the existence of the Rochester Telephone Corporation of the Bell directors as compared with the local directors in number of meetings and average attendance per meeting, and carry that same data through each year down to the present time.

A. For the 16 years——

Mr. McDowell: Just a moment please. I think that that is objectionable for the reason that he has not qualified. If they have the minutes of the meetings to show who did and who did not attend it would be a different proposition.

Mr. Nixon: I will qualify him, if your Honor sustains the objection.

The Examiner: The question calls for firsthand information on the part of the witness as to the attendance, and

in his testimony I take it that he is testifying to something that he knows about, not something that he has copied from any records.

Mr. Nixon: That is not exactly so. I do not think this witness has attended every single meeting since 1921 of this corporation.

The Examiner: Then how can he testify of his own knowledge as to how many directors representing the New York Telephone Company attended a given meeting?

Mr. Nixon: Well, he can examine the records of the corporation for the purpose of finding out, and that is the only way I know of that any individual can.

[fol. 194] By Mr. Nixon:

Q. Mr. Boylan, have you personally attended every meeting of the directors of the Rochester Telephone Corporation since its organization?

A. Every meeting but one.

Q. That is better than I thought. What meeting did you miss, what year was it?

A. I will give it to you. The last Friday in December, 1924.

Q. Now, have you had someone connected with the Rochester Telephone Corporation examine the minutes of the meetings of the directors from the first meeting of directors down to the last for the purpose of giving you information with regard to the attendance of New York directors as compared with Rochester directors?

A. I have.

Q. And based on that examination, plus your own personal knowledge over all these years, having attended all directors meetings with the exception of the one you have mentioned, are you able to state how the attendance of the New York directors compared with the Rochester directors at the various meetings of the board of directors of the Rochester Telephone Corporation?

Mr. McDowell: That is objectionable.

The Examiner: If you cross out the first part of your question and leave the last, based upon your own knowledge, that would not be objectionable.

Mr. Nixon: I will yield to your Honor's suggestion, but I think I am quite within my rights in asking him to refer to [fol. 195] the records of the corporation.

The Examiner: Let me ask the witness a question. Who was it that examined the records of the meetings of the board of directors?

The Witness: Our statistician.

The Examiner: Is he or she here?

The Witness: No.

The Examiner: Whoever the person was that made this report to you?

The Witness: No, sir.

The Examiner: How often do the board of directors meet?

The Witness: Once a month.

The Examiner: Have you here the copy of the minutes of the meetings of the board of directors?

The Witness: No, sir.

The Examiner: Are those gotten up into pamphlet form?

The Witness: They are in a loose-leaf bound volume.

The Examiner: In bound volumes?

The Witness: Yes, sir.

The Examiner: Are they made out in duplicate or triplicate, or is it just one copy?

The Witness: There are duplicate copies made for the members of the executive committee in addition to the one filed.

The Examiner: Is it possible for you to furnish the Examiner with a copy of those minutes?

The Witness: Yes, sir.

The Examiner: I suggest he furnish the copy and mark it the next exhibit number.

[fol. 196] Mr. Nixon: I will be very glad to comply with your Honor's request, but the witness has here a tabulation and he is quite willing to testify to what the result is.

The Examiner: There is no objection to his testifying to the tabulation if you furnish a record of the minutes of the meetings.

Mr. Nixon: Very well. May the witness now proceed, with my promise that in due course I will provide you with the minutes of every directors' meeting of this corporation from 1921 down to date, as soon as I have the ability to have that copied? We cannot take the original.

The Examiner: I understood you had copies.

Mr. Nixon: No, we haven't. Mr. Boylan is mistaken about that. They are all bound together in a big record. The only thing we can do is to bring the directors' meetings

of the corporation and offer them to you, or have copies made of the complete history of the corporation.

The Examiner: The witness may answer the question in any form you desire to ask it with the understanding that if Commission counsel or the Examiner desires the records that they will be submitted later on, they will be produced later on.

Mr. Nixon: All right.

By Mr. Nixon:

Q. Go ahead now, Mr. Boylan.

A. For the sixteen years covered by the exhibit the average attendance of the New York Telephone Company's director- was about two and one-half per meeting out of a possible five, and an attendance ratio of approximately 51 [fol. 197] per cent, while the average attendance of the local directors was about 7.7 out of a possible 10, an attendance ratio of almost 77 per cent.

The Examiner: Wait a minute now. What does that mean? Analyze that for me.

The Witness: It means that there are 10 directors whom we term local directors and their average over 16 years, the average attendance of those 10 directors, has been 7.7 directors per meeting.

By Mr. Nixon:

Q. Out of a possible 10?

A. Out of a possible 10.

Q. What are the figures with regard to the New York directors?

A. Out of a possible five New York directors the average over this period in attendance is two and one-half directors per meeting.

Q. Now, what are the figures with reference to the total number of directors attending the meetings, both as respects the New York directors and Rochester directors, that is, assuming that there were 12 directors present at a meeting? Have you something to show how many of those were New York directors and how many Rochester directors over this whole period?

A. That is all contained in this exhibit by years.

Q. You may testify from the exhibit but do not put the exhibit in.

The Examiner: Let me see the exhibit. While counsel looks at this go ahead with something else.

[fol. 198] By Mr. Nixon:

Q. Mr. Boylan, will you state briefly how proposals for new construction or additions to plant, or major propositions of any kind, originated in the Rochester Telephone Corporation?

A. They originated in our engineering department and they originated from two different sources, one a recommendation by the vice president and commercial manager after his forecast of additional telephones for the coming year. The chief engineer will provide the additional plant necessary to cover the commercial manager's forecast in that respect. The other is the natural wearing out of the property, which comes under the jurisdiction of the chief engineer to replace as rapidly as it is worn out.

Q. Now, what is the procedure after some new proposal originates, what happens to it next?

A. I might say that we forecast one year in advance as to both of these things, and our board of directors are asked to approve a budget covering the proposed expenditures for the entire coming year. This budget is approved as a whole, except that each specific estimate, the project must be separately approved by the board of directors when presented on each specific estimate. These estimates are drawn up by our chief engineer and submitted to the president, and after the president has examined the estimate and consulted with the chief engineer about it he passes it on to the board of directors at the next meeting for their approval. Subsequently, when the estimate is completed, the chief engineer submits what we term a completion record, [fol. 199] and any over expenditure is authorized by the board at that time. Any under-expenditure, of course, is turned back, or, rather, the difference between the amount authorized and the amount expended, that expenditure is rescinded.

[fol. 200] Mr. Nixon: If your Honor please, I now offer in evidence an analysis of attendance at the meetings of the board of directors, dated January 3, 1936, which the witness has testified was prepared under his direction and as to which he has said he has attended every meeting of the board of directors of the Rochester Company with the exception of one, and my purpose in offering it is to show

the record of attendance of both the directors as so-called Bell directors at directors' meetings in comparison with Rochester or local directors so-called.

The Examiner: The analysis may be marked for identification only at this time as respondent's exhibit for identification A. Is there any objection to the admission of respondent's exhibit A for identification?

Mr. McDowell: Yes, I object to its admission unless the copies of the minutes of the meetings will be provided the Commission for purpose of comparsion.

Mr. Nixon: Do you mean by that you want the complete minutes of all of the meetings of the directors, or merely a certificate of the secretary of the corporation to the effect that certain named directors attended certain meetings on certain specified dates? The one is comparatively simple; the other is comparatively difficult.

The Examiner: One would be, to my mind, the same as this, and the other would be the record. There is no difference between your producing the certificate of the secretary of the corporation than your producing something here which is offered by the president of the corporation. Both would be prepared by somebody else, and all that the [fol. 201] one that you are suggesting would have would be just the secretary's seal on it instead of the president's testimony.

Do I understand that counsel for the Commission objects to the introduction of Respondent's Exhibit A unless the respondent is willing to produce the minutes of the meetings of the board of directors for the period as covered by the exhibit?

Mr. McDowell: That is correct.

Mr. Nixon: I am going to withdraw the offer then, if your Honor please, because it seems to me it is going to require us to do a great deal of unnecessary work, and we are not offering the proceedings of the board of directors at all. We are merely trying to show that of a given number of meetings, a certain number of New York directors appeared and a certain number of Rochester directors appeared. What happened at those directors' meetings is wholly immaterial. I see no occasion to load the record up with the contents of those meetings, and I do not see any reason why I should be put to the expense of producing those documents, and therefore with that explanation I am going to withdraw my offer.

Mr. McDowell: Then I move to strike out the witness' entire testimony with reference to this particular subject by reason of the fact that it was admitted under the agreement of counsel to submit the minutes of the meetings if requested to do so. I do not know that the Commission will want it.

The Examiner: Commission's counsel motion is denied, [fol. 202] and Examiner will receive the respondent's exhibit in order that the record may disclose just what this document is, but will not admit it as testimony, and will note the exception of counsel for the respondent to the Examiner's refusal to admit it.

By Mr. Nixon:

Q. Now, Mr. Boylan, based on your knowledge from your attendance at the meetings of the directors of the Rochester Telephone Corporation from its organization down to date, with the exception of the one meeting which you have mentioned, will you tell us what you have observed personally with relation to the attendance of directors representing the New York Telephone Company, to those representing the Rochester local interests?

A. I would say as a general proposition it would run about seven to three or eight to two.

Q. Has there to your knowledge at anytime during this period ever been an occasion when there were more Bell directors present at a director's meeting than there were Rochester directors?

A. No sir.

Q. Has there ever been a time when there has been anywhere near an equal amount?

A. No.

Q. What is the closest approach to it that there ever has been? You can refresh your recollection if you want to by referring to that exhibit.

Examiner or Counsel: That was not prepared by him. I think you have covered the matter. There is no use of [fol. 203] using the document that has been ruled out.

By Mr. Nixon:

Q. Can you say from your own recollection without even refreshing your recollection from this exhibit?

A. I recollect that at one meeting all five New York directors were present. And that was the only time that all five were present. From my memory, I would say that perhaps there were three meetings when four were present out of the entire number.

Q. And how many meetings at which less than three were present?

A. I would say perhaps over 90 percent.

Q. That is, at over 90 percent of the directors' meetings, less than three of the New York directors were present?

A. I would say three or less.

Q. Three or less of the New York directors have been present, is that correct?

A. That is my recollection.

Q. And at the same time there has been at least how many of the Rochester directors present?

A. Well, our average attendance is about ten, I believe.

Q. Now, will you tell us who the members of the executive committee are at the present time?

The Examiner: That is already in the record, isn't it?

Mr. Nixon: Their names were not stated.

By Mr. Nixon:

Q. Tell us who the members of the executive committee [fol. 204] are at the present time?

A. The local members of the executive committee are Fred C. Goodwin, Raymon N. Ball, and John P. Boylan.

Q. Are there some New York representatives on that committee?

A. There are two.

Q. Who are they?

A. James W. Hubbell and Frank Lawrence.

Q. How often does the executive committee meet?

A. The executive committee met once in 1935.

Q. Is that about a fair average of its meeting times?

A. I believe so.

Q. It meets in the absence of meetings of the board of directors, is that correct?

A. Yes.

Q. Will you state whether or not any license fees or any part of the revenue of the Rochester Telephone Corporation is paid to the New York Telephone Company?

The Examiner: What license fees are you referring to?

Mr. Nixon: Off the record——

The Examiner (interposing): No, on the record.

Mr. Nixon: I have understood that this Commission is interested in finding out whether license fees were paid at any time by the so-called independent companies to the Bell System. My purpose in asking that question is to show that no such fees are paid by the Rochester Telephone Company to the New York Telephone Company.

The Examiner: Now, what is the question?

(The question was repeated.)

[fol. 205] The Witness: No, as I understand the question.

The Examiner: Do you understand the question?

The Witness: I understand that you are asking if any part of our gross revenue is paid for services——

By Mr. Nixon:

Q. (Interposing.) I will split it up. I will ask you first whether or not if any so-called license fees are paid by the Rochester Telephone Corporation to the New York Telephone Company?

A. No.

Q. I will ask you whether or not any gross revenues of the Rochester Telephone Corporation are paid to the New York Telephone Company except for services actually performed and at rates which you consider reasonable?

A. No such fees are paid except for things you mention.

Q. Will you state whether or not there is any agreement or arrangement between the Rochester Telephone Corporation and the New York Telephone Company for the purchase of supplies?

A. We have no such agreement with them or any of the subsidiaries.

Q. Will you tell us where the majority of the purchases of the Rochester Telephone Corporation are made?

A. The majority of the purchases are made from independent manufacturers and local jobbing concerns.

Q. Describe and name some of the independent manufacturers of telephone equipment with whom the Rochester Telephone Corporation deals?

[fol. 206] A. I have the names of some fifty concerns that we have paid over a thousand dollars each for supplies

and equipment during the last year. I do not imagine you want all of the names, but I can pick out a few of the most prominent ones. They are:

The American Automatic Electric Sales Company.
The Ananconda Wire and Copper Company.
The Automatic Electric Company.
The Calculagraph Company.
The Cook Electric Company.
The National Lead Company.
The North Electric Company.
The Linen Thread Company.
The Russell Core and Wire Company.
Star Expansion Bolt Company.
The Examiner: Have you a long list there?
The Witness: No, there is a couple of more.

By Mr. Nixon:

Q. Stromberg Carlson Company?
A. Kellog Switchboard and Supply Company.
Stromberg Carlson Telephone Manufacturing Company.
Those are few of the fifty I have listed here, the purchases from which have exceeded $1,000 each in 1935.

Q. And you consider all of those companies independent in every way of the Bell Telephone Company or any of its affiliates?

A. I do.

Q. You have some officer of the Stromberg Carlson Telephone Manufacturing Company who is also a director of [fol. 207] the United States Independent Telephone Company?

A. Yes sir.

Q. What officer is that?

A. The vice president and general manager.

Q. What is his name?

A. George Scoville.

Q. Will you state whether or not it is the fact that every officer of the Rochester Telephone Corporation who was employed by that corporation in 1921 is still an officer of the corporation?

A. If he is living, yes.

Q. Unless dead?

A. That is correct.

Q. Will you name some of those officers who were officers at the date of the organization of the corporation and who are still officers of it?

The Examiner: I do not see any need for that. I think we have been all over that unless it — different than the previous witness.

Mr. Nixon: It has not been testified to by any previous witness, and I will say again for the record that it has already appeared before this Commission that officers of the Bell controlled companies are frequently changed about, and as evidence of the fact that the Bell does not control the Rochester company, I propose to show that every person who was an officer of the corporation in August 1921 is today still an officer of the Rochester Telephone Corporation if he is alive.

The Examiner: I think Mr. Goodwin so testified.

[fol. 208] Mr. Nixon: If your recollection will serve for the purpose of the record, I will take it.

The Examiner: All right.

By Mr. Nixon:

Q. Now Mr. Boylan, are you familiar in a general way with some of the practices generally carried on by the Bell Telephone companies in regard to the operation of telephone properties?

A. I believe so.

Q. Will you please point out a few points of dissimilarity between the manner in which the Rochester Telephone Corporation is operated and the manner in which a Bell controlled company is operated?

Mr. McDowell: I think that is objectionable. It is merely a conclusion of the witness as to the method of operation of the Bell Telephone companies.

Mr. Nixon: It is no conclusion at all; it is a statement of fact that he has observed of dissimilarities. I do not know how you can get any closer to the question of control than to show that this company does not follow the usually accepted Bell practices.

The Examiner: Have you a list of those?

Mr. Nixon: No, the witness is going to testify from his recollection. I have not even a list myself.

The Examiner: Has the witness a list of them?

Mr. Nixon: He has a memorandum here to testify from.

The Examiner: I was wondering if it could not be marked as an exhibit.

Mr. Nixon: No, I would rather have him tell about three [fol. 209] or four cases. I do not expect to put in twenty or thirty things; just four or five things.

The Examiner: All right.

By Mr. Nixon:

Q. All right, Mr. Boylan; go ahead.

A. I have a copy of the telephone directory of the Rochester Telephone Corporation.

Q. I want you to describe this, Mr. Boylan, so that we do not have to put the telephone directory in evidence. If you cannot do that, let us forget that dissimilarity and take some other point. State the points of dissimilarity between the two companies' practices in regard to telephone books.

A. In the first place, we furnish a much finer quality of paper. It is what is known as paper used by magazines rather than newspapers.

Mr. McDowell: I think your Honor, this is objectionable for the reason that is has no bearing at all as to the control of the Rochester Telephone Corporation.

The Examiner: It is going to be very brief; let us have it.

The Witness: The Bell Company uses an inferior quality of paper throughout New York State and they use a four column and smaller type than we do.

The Examiner: In other words, the method of getting out their telephone directory?

The Witness: It is entirely different.

The Examiner: That covers that.

The Witness: The business classification section is yellow [fol. 210] with them and it is pink with us.

By Mr. Nixon:

Q. Does the Bell Telephone Company employ the same sort of directory in every community where it controls the telephone company?

A. So far as I have observed.

Q. That is, it is more or less of a standard directory, is that correct?

A. I believe so.

Q. And the Rochester Telephone Corporation, differs in some respects which you are willing to point out, from the so-called standard directory of the Bell Companies. Am I correct?

A. That is correct.

Q. State another point of dissimilarity in the practices of the two companies?

A. The Rochester Telephone Corporation observes six holidays during the year. The New York Telephone Company eleven.

Q. Is that practice of observing eleven holidays uniform throughout the companies that are controlled by the Bell System?

A. I could not tell as to that.

Q. Do you know any of the Bell companies where the eleven holidays are recognized?

A. I know that some of them do recognize holidays that are considered holidays in the States where they operate.

Q. But the Rochester Telephone Company does not recognize any more than the six legal holidays, is that correct?

[fol. 211] A. That is correct.

Q. What other points of dissimilarity are there? I will refresh your recollection. Tell us about coin box collections.

A. We have a contract with the subscribers having coin box telephones by which we pay them a straight 10 per cent commission on the receipts of the box. The New York Telephone Company has a sliding scale which runs from 10 to 20 per cent.

Q. Is that practice with regard to a sliding scale of commissions to paid coin boxes uniform throughout the companies which the Bell Company controls as far as you know?

A. It is uniform throughout the State of New York.

Q. For all Bell controlled companies?

A. Usually the practices by the Bell companies of the State of New York are uniform throughout the United States.

Q. Is there any other point of dissimilarity which you wish to call attention to?

A. Previous to the repeal or rescinding of the Act, the American Telephone and Telegraph——

Mr. McDowell (interposing): What Act?

The Witness: The Federal Revenue Act. The American Telephone and Telegraph Company made a joint return——

By Mr. Nixon:

Q. (Interposing.) Consolidated return?

A. Yes, a consolidated return for itself and all of its subsidiary companies. The Rochester Telephone Company has always made its own return.

Q. Ever since its organization?

[fol. 212] A. Ever since its organization.

Q. Are there any other points of dissimilarity that you wish to emphasize? Just pick out one more and then I will stop.

A. We differ of course generally in a great many details in the operating practices and methods, and our rates are different. Our scheduled rates for services to the subscribers are considerably different. That is true with main line service, it is true with extension telephone service for both residence and business. Without going into all the details, I think I have covered generally some of the differences.

Q. All right. Will you state whether or not you personally own any stock in the American Telephone and Telegraph Company?

A. No I do not.

Q. Or any Bell Telephone Company or any of its affiliates?

A. No sir.

Q. Will you state whether or not the only way in which the Rochester Telephone Corporation is enabled to carry a message from within the State of New York to some point outside the State of New York is by connection to the facilities of the New York Telephone Company?

A. That is correct.

Q. And that is so stated in the questionnaire, amended form No. 11,450?

A. Yes.

Mr. Nixon: That is all, and I want to remind you that this [fol. 213] is the witness that ought to know something about the TWX. I don't know what he is talking about, but you can ask him about it.

The Examiner: Now, counsel for the Commission?

Cross-examination.

By Mr. McDowell:

Q. How long did you say you had been connected with the Rochester Telephone Corporation?

A. Since August, 1921.

Q. That was when they first began business?

A. Yes.

Q. Where were you located immediately prior to that?

A. In Plattsburg, New York, with the Mountain Home Telephone Company.

Q. How did you happen to come with the Rochester Corporation?

A. Through Mr. Fuller, who had made several trips to Plattsburg while negotiations for its consolidation were going on, consulting with us and through the man who operated the independent properties in northern New York that were to be consolidated before I went there.

Q. Did you have any conversation with Mr. Fuller or anyone at that time with reference to the set-up of the New York Telephone Company as to its operation?

Mr. Nixon: Do you mean the Rochester Telephone Corporation?

Mr. McDowell: Yes.

Mr. Nixon: You said the New York Telephone.

Mr. McDowell: The Rochester Telephone Corporation. [fol. 214] And what your particular function would be there?

The Witness: No. The trips that Mr. Fuller and some of his associates made to Plattsburg was seeking information on the cost of consolidation, which the Mountain Home Telephone Company had been through. There was a similar consolidation in the Mountain Home Telephone Company with Bell properties extending over a period of years, beginning in 1912.

[fol. 215] Q. During all of this time, were they talking to you about getting into the employ of the Rochester Telephone Corporation?

A. No, that matter did not come up until quite late.

Q. I am referring to your conversation with reference to accepting employment with the Rochester Telephone Corporation.

A. No, that came up about six months previous to my coming to Rochester.

Q. Who owned the Home Telephone Company?

A. What Home Telephone Company?

Q. Wasn't that where you were employed? The Mountain Home Telephone Company.

A. I believe the stock control was in the hands of the New York Telephone Company.

Q. Then in effect, during that time that you were employed there when the stock control of the Mountain Home Telephone Company was in the hands of the New York Telephone Company, weren't you virtually in the employ of the New York Telephone Company?

A. Not exactly. I want to amend what I said about the control being with the New York Company. When I left the Mountain Home Telephone Company, I am quite sure that they had secured the stock control, but I cannot say that I am so sure about it at the time I went there.

Q. When was it acquired?

A. I could not say.

Q. Prior to your leaving, was it not?

A. I believe so.

[fol. 216] Q. What was your connection there?

A. I was vice president and general manager.

Q. You were in as good a position to know about that there as you are as to your present employment, were you not?

A. No. My chief concern there was an operating official. The president of the company looked after all the financial matters.

Q. Did you ever have occasion to talk to any of the New York Telephone employees while you were there?

A. Yes, I came in contact with them.

Q. Their officers?

A. Yes.

Q. Who, for instance?

A. At that time Mr. Howard Thurber was president of the New York Telephone Company, and they had pretty much the same set-up as we have now in the Rochester Telephone Corporation, that is, there were thirteen local directors and two Bell directors on the board of the Mountain Home Telephone Company. Our manner of originating estimates and rebuilding the plant was carried on exactly the same as with the Rochester Telephone Corporation, in fact, they all originated in our own territory.

Q. This president of the New York Company consulted with you with reference to the management of the plant?

A. No, nobody consulted with me with reference to the management of the plant.

Q. You were the manager, weren't you?

A. I was, but I came under the board of directors of the [fol. 217] Mountain Home Telephone Company.

Q. None of the New York Telephone Company people ever consulted with you with reference to the management?

A. No, sir.

Q. What was the occasion for your talking with the president of the New York Telephone Company?

A. He was a director of our company, and he came to the meetings quite regularly.

Q. What did you talk to him about?

A. We talked about telephone matters.

Q. With reference to what?

A. General telephone situations.

Q. Nothing at all with reference to the Mountain Home?

A. Oh, I naturally talked with him about plans we had in contemplation, but not with any idea of securing his approval on them.

Q. You were not a director of the Mountain Home, were you?

A. For a short time.

Q. What period was that?

A. It was, I think, in 1923, that is, between the time that one of the directors had died and his place was filled by another local man. I filled in for the interval for probably less than a year.

Q. During the time that the New York Telephone Company had the control of the Mountain Home Telephone Company, you were the manager there, and did you talk with the president of the New York Telephone then at all?

[fol. 218] A. I saw him at the meetings.

Q. The directors meetings?

A. Yes.

Q. Was there any discussions there, formal discussions at the meetings, about investments in plant and equipment and extension of line, or anything else in which the general manager was necessarily consulted?

Mr. Nixon: Your Honor, I do not want to seem to try to conceal anything, and I am not going to object, but I think

we are afield. The question here is not whether the Mountain Home Telephone Company was controlled by the Bell or not. The question is whether the Rochester Telephone Corporation is so controlled. This man has been with the Rochester Telephone Corporation for ten years. The implication of counsel's question is that by reason of some agreement that he might have had with the Mountain Home Telephone Company, he is still controlled by the Bell. It seems to me we are far afield.

Mr. McDowell: I am merely getting facts, that is all.

Mr. Nixon: I claim it is irrelevant, and I object to it on that ground.

The Examiner: Counsel for the respondent has seen fit to go into the question of the different methods employed in the management of the respondent company, and it seems to me that counsel for the Commission is now trying to show that the manner in which this other company was operated, which company was controlled by the New York Telephone Company, was similar to the method which is adhered to [fol. 219] in the Rochester Telephone Corporation. It seems to me he is meeting the very issue that you brought up.

Mr. Nixon: I will content myself with an objection and exception if you want it in and want to go on with it.

The Examiner: We will go ahead with it briefly, and your objection and exception is noted.

By Mr. McDowell:

Q. The New York Company still controls the Mountain Home Telephone Company, does it not?

A. The Mountain Home Telephone Company has passed out of existence. It has been acquired by the New York Telephone Company.

Q. That company was operated along the same lines as the Rochester Telephone Corporation, was it not?

Mr. Nixon: I object to that unless you limit your question to a certain particular. That is a pretty broad subject. If you will specify regarding operation or purchases or anything else, I have no objection.

By Mr. McDowell:

Q. In the same respects in which you have enumerated the differences here.

A. In so far as the number of local directors and Bell directors are concerned, it is the same, yes.

Q. In no other respects?

A. I should say that the duties and responsibilities of its operating officials were the same; in other words, all of the necessary repairs and extensions of the property were made under my supervision and instigated by me as general [fol. 220] manager, and I do not remember of any recommendation that I made to the Board of Directors that was not approved.

Q. Were any of those suggestions of yours to the board of directors prompted by advice or requests of any official who was an official of the New York Telephone Company?

The Examiner: What company are you talking about?

Mr. McDowell: The Mountain Home.

The Witness: No, we had a sparsely settled community up there and we had to resort to every means possible to make both ends meet.

By Mr. McDowell:

Q. Who did the engineering work?

A. I did.

Q. None of it provided by the New York Telephone Company?

A. No, sir.

Q. The A. T. & T. service for consultation was not utilized at all by that company?

A. Not to my knowledge. I am quite sure it was not.

Q. You just had a free hand without any interference, suggestion or anything else?

A. It was necessary that I have a free hand, because we had a very difficult problem in operating that territory.

Q. To whom did you first talk about your employment with the Rochester Telephone Corporation?

A. Mr. Fuller.

The Examiner: He has testified to that.

[fol. 221] By Mr. McDowell:

Q. Where was that conversation?

A. That was in Plattsburg.

Q. Did you come to Rochester with reference to that particular thing?

A. Yes, Mr. Fuller requested me to come to Rochester and meet Mr. Goodwin.

Q. And you did so?

A. I did so.

Q. How long was that before the consolidation of the companies or the beginning of the operation of the Rochester Telephone Corporation?

A. I think that was in July, 1921.

Q. Did you talk to Mr. Goodwin?

A. I did.

Q. What was the nature of that conversation?

A. Mr. Goodwin said that Mr. Fuller had told him that I had had considerable experience in consolidating properties, especially during the last ten years, and he wanted to know if I would entertain a proposition to come to Rochester as the vice president and general manager of the new company. He told me what the salary would be.

Q. What was that, if you don't mind telling?

A. I think it was $11,000 a year.

Q. Did you talk to anyone else in Rochester about it before you accepted the employment?

A. No, I did not.

Q. How long after that conversation was it before you accepted employment and went to work?

[fol. 222] A. I came back on the first of November of the same year and assumed the position of vice president and general manager.

Q. That was after they were in operation?

A. Yes.

Q. Your function as vice president and general manager then continued until the death of Mr. Fuller in 1927?

A. Yes, sir.

Q. And then you were made president and general manager?

A. Correct.

Q. At a salary of $21,000 a year, is that correct?

A. No, I do not get $21,000 a year.

Q. Have you ever received $21,000 a year?

Mr. Nixon: I do not see how this is competent, your Honor. I do not know whether the witness objects to disclosing the amount, but I can see reasons why he should. I do not see how it has anything to do with the question of control. The compensation that this man gets is his own

affair and nobody else's, it seems to me. There are other telephone men present in the room, and I do not know at all how the witness feels about it, but he may have good reasons for not wishing to disclose it.

The Examiner: I do not see any reason for going into it now.

Mr. McDowell: I withdraw the question.

By Mr. McDowell:

Q. With reference to the payment of dividends on the [fol. 223] preferred stock, you have testified that it is necessary to pay out $389,369 a year dividends on all of the preferred stock, and that is paid from surplus earnings, is that correct?

A. It is in a way, yes, paid through surplus.

Q. You have also testified that the surplus earnings as of December 1st, 1935, was $1,298,490?

A. Yes.

Q. Dividends were paid from that?

A. No, that is the amount of the surplus that we have at the present time. That is as of the first of December, 1935.

Q. You have testified that the last three years the company operated at a loss?

A. Yes, sir.

Q. I would like for you to explain how you figure that if they operate the same as they have operated during the past three years at a loss, the surplus earnings of $1,298,490 as of December 1st, 1935, are assured of paying those dividends every year for more than 40 years?

A. Of course the corporation did earn a greater portion of its preferred dividends. It did not earn all of the dividends, but the amount it failed to earn divided into its surplus would represent about a 40-year period.

Q. The report of the Rochester Telephone Corporation to the Commission to December 31st, 1934, discloses that [fol. 224] the dividend requirements were $394,069.

A. Does it show the division of that?

Q. The division of that would be $148,369 on the first preferred.

A. And what on the second preferred?

Q. $240,700 on the second preferred, and $5,000 on the common. It also shows that the interest on the first mort-

gage was $62,839.63. On the Series B. And the Series C bonds, $225,000.

A. I testified that I believe that the corporation during the past three years, that is, preceding 1934 and including 1934, failed to earn its dividend by about $30,000, per year so that if we had $1,200,000, at 40 years times $30,000 is $1,200,000, the amount we have in our surplus.

Q. It also discloses that the interest paid the Perry Telephone Company obligations was $1,700. The interest requirements are $289,539.03. Other annual interest, $41,352.95. Altogether making a total of $724,960.98. It also shows a surplus balance of $1,538,143.48.

Mr. Nixon: What year is that?

Mr. McDowell: 1934.

By Mr. McDowell:

Q. Now, according to your statement, the fixed charges would consume that present surplus or that surplus——

Mr. Nixon: That is, assuming that the company did not make any more money, in 2.1 years without the benefit of further operating profits.

[fol. 225] You mean if the company closed down and had to use all of its surplus to pay its interest on its preferred stock and on the common stock, it could not last over two years, is that correct?

Mr. McDowell: Yes.

Mr. Nixon: What he was referring to was that if it operated in the same way for the next 30 or 40 years as it has for the last three years——

The Witness (interrupting): The three worst years.

Mr. Nixon: Only three years have they failed to be in the black at the end of the year.

The Witness: And we could pay the second preferred dividends for a period of 40 years or more. That there was enough in our surplus to take care of that.

By Mr. McDowell:

Q. If the rate of earnings for the past three years is maintained, isn't it a fact that that present surplus would become exhausted in about 12 years?

Mr. Nixon: How do you figure that out?

The Examiner: The net deficit as a result of your operations and the payment of your annual indebtedness as the result of your preferred stock is what?

The Witness: Will you give me that amount, please?

The Examiner: Your net indebtedness.

The Witness: For what period?

The Examiner: For this present year, 1935, say. As I understand you, that is about $32,000.

Mr. Nixon: That you had to dip into your surplus for these three years.

[fol. 226] The Witness: Yes.

The Examiner: As I understand your testimony, you estimated that if the net indebtedness for the next 40 years is not any more than that, you have by reason of your surplus enough to meet it?

The Witness: Correct.

Mr. Nixon: Assuming operating revenues comparable with the last three years, which were the worst three years in the history of the corporation. That is correct, isn't it?

The Witness: As a matter of information, this year we will have an undivided profit from our year's operations, in other words, we will be in the black figures in 1935, so that that period of 40 years can be extended as a result.

By Mr. McDowell:

Q. Before I forget it, I would like to ask you whether or not there is a TWX service in Rochester? That is as I understand it where they are performing service, providing service for the teletypewriter.

A. We have a TWX service in Rochester, yes.

Q. With respect to this TWX service, in what way is it furnished by the Rochester Telephone Corporation, if any?

A. The Rochester Telephone Service does not furnish TWX service direct to the subscriber.

Q. You say "direct to the subscriber". Does it participate in the furnishing of that service?

A. It leases or runs a loop and it leases wire to the New [fol. 227] York Telephone Company for that purpose.

Q. Do you know many loops or how much of such wire you lease to the New York Telephone Company for that purpose?

Mr. Nixon: If your Honor please, there is not a word in the order about TWX, and I never in my life heard the

expression until I got here today, and I still don't know what it is about, except that it is connected with teletypewriter, and it seems to me it is not a proper subject of inquiry in this proceeding. I do not know what the object is, and I do not see any point in asking about it.

The Examiner: The Rochester Telephone Corporation has an agreement with the New York Telephone Company in regard to the matter of the furnishing of teletypewriter printers to your customers.

The Witness: Yes, sir.

The Examiner: What is the contract that the Rochester Telephone Corporation has with the New York Telephone Company in the matter of furnishing teletypewriter printers to your subscribers, if any?

Mr. Nixon: Do not let me distract you, but just for the purpose of the record, I object to that as incompetent, immaterial and irrelevant, and not within the contemplation of the order on which this hearing is based.

The Examiner: The objection is noted.

The Witness: To the best of my recollection, the New York Company pays $4 per month for a loop or drop wire which we furnish from the subscriber's premises to our cable entrance, aerial or underground, and it pays $4 per [fol. 228] mile per month rental for such wire to bring it into the toll board of the New York Telephone Company, and that the Rochester Telephone Corporation is compensated at the rate of 5 cents per message based on a previous study of the subscriber toll usage to compensate it for its loss in commissions as the result of this teletypewriter service being carried on directly between the subscriber and a distant station operated presumably by the Bell Company.

The Examiner: How many teletypewriter printers are there in use by your subscribers?

Mr. Nixon: Same objection.

The Examiner: Your objection is noted.

Mr. Nixon: Exception.

The Witness: I should say about 12.

The Examiner: Is there a specific contract between the New York Telephone Company and the Rochester Telephone Corporation in the matter of furnishing teletypewriter printers to the subscribers of the Rochester Telephone Corporation?

The Witness: The witness who follows me may be able to answer that question. I am not positive.

By Mr. McDowell:

Q. As president and general manager of the Rochester Telephone Corporation, I presume that you are entirely familiar with the general set-up and methods of operation of the company, is that true?

A. I think so.

Q. Do you have a contract or agreement with the New York Telephone Company, a traffic agreement?

[fol. 229] A. Yes, sir.

Q. Have you a copy of it with you?

A. I have.

Q. Will you produce it, please?

A. (Producing paper.)

The Examiner: Does the respondent want to offer that in evidence so that it can be marked Respondent's Exhibit 17?

Mr. Nixon: I am not interested in that. The Commission is. I am producing it at the request of the Commission, and I do not object if they offer it.

Mr. McDowell: I ask that it be marked.

(Not introduced.)

The Examiner: Have that marked Commission's Exhibit A.

(The same is so marked.)

By Mr. McDowell:

Q. State if you know whether this is the only contract or agreement that the Rochester Telephone Corporation has with the New York Telephone Company with reference to the furnishing of facilities and the interchange of telephone service?

A. No, there is another contract covering facilities.

Q. Have you a copy of that contract?

A. The next witness will have that.

Mr. Nixon: I will produce that now if you want me to.

The Witness: That is a contract which covers the interchange of pin rental, wire rental, joint pole lines, conduit rental, and rental of similar equipment and plant.

The Examiner: The next witness can produce that. Let us go ahead.

[fol. 230] By Mr. McDowell:

Q. Referring to Respondent's Exhibit 16, which is the response to questionnaire executed by yourself and filed with the Commission, referring to the page which contains your signature in response to No. 7 there, which gives the total amount of income of your company for the year ending December 31, 1933, $4,442,092.65, and the total amount of operating expenses for the same period, including taxes, $3,725,123.45.

A. That is correct.

Q. That refers to the gross receipts and the entire operating expenses, but has no reference of course to the payment of dividends or interest, is that true?

A. Correct.

Q. In the attached statement which shows, which contains the replies to various previous interrogatories, the Interrogatory 10-B which requires you to list the stockholders owning more than one per cent of the outstanding capital stock, of the class described, with particular reference to common stock, you there state that 665 shares of common stock are owned by Fred C. Goodwin, J. F. Warner, and John P. Boylan. That is correct, is it not?

A. That is correct.

Q. Do you own any of that stock?

A. Only in exercising my duties as a voting trustee.

Q. Do you own it or do you only have the right to vote it?

Mr. Nixon: That has already been gone over by Mr. [fol. 231] Goodwin. This is one of the voting trustees of that 665 shares of stock.

The Witness: Mr. Goodwin has testified that he personally owns 665 shares, so I could not possibly own any.

Mr. Nixon: Mr. Goodwin said he had the beneficial interest in it. If you want to be technical, this is one of the men in responsibility with him in the ownership of that stock.

By Mr. McDowell:

Q. You do not own any stock whatever in the Rochester Telephone Corporation, do you?

A. Yes I do. I own some preferred stock.

Q. How much?

A. Thirty shares, I believe.

Q. You own none of the common?

A. None.

Q. And never have owned any of the common?

A. No.

Q. None of the other directors, with the exception of Mr. Goodwin, owns any of the common stock, do they?

A. Not to my knowledge.

Q. Can you tell us what incentive or what inducement these other directors have to act as directors in this corporation?

A. I imagine principally as a matter of civic interest.

Q. Do they get paid for it?

A. They receive a director's fee for each meeting attended.

[fol. 232] Q. For attending your meetings. Do you know how much that is?

A. Yes, sir.

Q. How much?

A. $10.

Q. You stated that the lease, sale or conveyance of the property rights and franchises, etc., of the Rochester Telephone Corporation would not be contemplated, isn't that right?

A. Yes, sir.

Q. What makes you say that?

A. Because I cannot conceive of any lease that might be made or any consolidation that might be made. I don't know of any.

Q. Do you know of any reason why it might not be done?

A. I cannot conceive of any reason why it should be done. There is no basis for it.

Mr. Nixon: This is one of the most successfully operated independent telephone companies in the United States. I cannot conceive——

The Examiner (Interrupting): Now, counsel.

Mr. Nixon: All right. I am out of order. I apologize, and I sit down.

The Examiner: No apology is necessary.

Mr. McDowell: In view of counsel's answer——

The Examiner (Interrupting): He has withdrawn it.

The Witness: I have the same answer in a sworn statement, if you would care to receive it.

[fol. 233] Mr. Nixon: If your Honor please, the witness is laboring under the idea that his testimony has already been filed with this Commission in affidavit form, and I am sorry to say that that was not a technical filing, therefore it is all brand new as far as the record is concerned. The affidavit we filed, Mr. Boylan, was not actually filed. It was a submission without any obligation on the part of the Commission to receive it or regard it as having been filed.

By Mr. McDowell:

Q. Do you know of any reason why it might not be done?

A. I would like to answer that by saying that I do not know of any reason why it should be done.

Q. Do you know of any reason why they might not want to issue more preferred stock?

A. No I cannot conceive why there should be any more preferred stock issued.

Q. You do not answer the question.

A. Will you repeat the question please?

(The question was repeated.)

The Examiner: The answer is yes or no. Do you know of any reason?

The Witness: I do not think they should issue any preferred stock, as there is considerable preferred stock authorized at the present time and not issued.

By Mr. McDowell:

Q. Can you state any reason why you would consider it impossible that any one of those six enumerated matters which should require 80 percent vote of the common stock [fol. 234] might not want to be done or accomplished?

A. I cannot conceive of any reason why any of them should want to be accomplished. Or rather, why it would be necessary for them to be accomplished.

Q. In the last paragraph on that page, which enumerates those different matters in the questionnaire—have you it before you there?

A. Yes, sir.

Q. You state that "The preliminary arrangements for the unification of the telephone service in the Rochester area provided by the Rochester Telephone Company would receive the bonds of the new corporation in payment for its property and that the New York Telephone Company would

receive preferred stock. In each case, the payment made was based on the appraised value of the property at the time of transfer. In accordance with these arrangements, the New York Company received $4,814,000 of preferred stock." Are you directly perfectly familiar with all of the arrangements that led up to that?

A. Yes, sir.

Q. Then you state: "In order to safeguard its interest approximating $5,000,000 in the new corporation, the New York Telephone Company also acquired 335 shares of common stock of the new corporation thus enabling it to name five of the corporation's fifteen directors." Will you explain if possible, how the New York Telephone Company could safeguard its interest with minority stock ownership which permitted it to have only one-third of the directors in the corporation?

[fol. 235] Mr. Nixon: If your Honor please, I object to the question as redundant, incompetent and immaterial, and already gone over fully by Mr. Goodwin.

The Examiner: Objection overruled.

Mr. Nixon: Exception.

The Examiner: The exception is noted. Answer the question please.

The Witness: Well, it could have a look-in on the management.

The Examiner: It could have what?

The Witness: A look-in. So far as the directors' meetings were concerned. I think that is about all.

By Mr. McDowell:

Q. In other words, just know what was going on?

A. Yes, sir.

Q. Is that what you mean?

A. Yes, sir.

Q. Is that what you had in mind when you stated here "in order to protect its interest?"

A. Safeguard its interest?

Q. Yes. Is that what you had in mind?

A. I presume so.

Q. If the voting trustees wanted to do anything by way of management of the company that did not require an 80 percent vote of the common stock, they were powerless to safeguard any interests, were they not?

A. Possibly, "safeguard its interest" is over-stated there, but they would get the same representation as is accorded any large stockholder that participates in such a deal as this [fol. 236] sort, that is, any minority interest.

Q. But nevertheless the voting trustees, yourself, Mr. Warner and Mr. Goodwin, could override any objection that those five directors cared to make, isn't that true?

A. I would say that the balance of the ten directors could do that.

Q. You elect the ten directors, don't you?

A. Yes.

Q. Now, with reference to the method of operation of the Rochester Telephone Corporation within its territory, do you know how many exchanges are owned and operated by the Rochester Telephone Corporation within its prescribed area?

A. Approximately 33.

Q. How many are owned by the New York Telephone Company in the same area?

A. There are none owned by the New York Telephone Company.

Q. No exchanges?

A. No, sir.

Q. Does the New York Telephone Company own any switchboards in that area?

A. I took your question to mean local exchanges. The New York Telephone Company owned its own toll switchboard in the city of Rochester.

Q. Where is that located in the city of Rochester, incidentally?

A. 95 Fitzhugh Street.

Q. Who owns that building?

A. The Rochester Telephone Corporation.

[fol. 237] Q. You lease, I suppose, to the New York Telephone Company.

A. Yes, sir.

Q. Has the Rochester Telephone Corporation a separate contract governing that?

A. We have a lease, yes.

Q. Do you know what they pay for that space?

A. No, but our chief engineer could answer that question.

Q. Is he here?

A. He is here.

Q. The personnel operating that particular switchboard is all provided by the New York Telephone Company?

A. Yes, sir.

Q. Does the Rochester Telephone Corporation have lines extending into that switchboard?

A. Yes, sir.

Q. You state here in this Exhibit 16 in reply to question 5 under "Statement as Exchange in Lines" that "the Rochester Telephone Corporation owns and maintains its own switchboards at all points at which it operates except that at Rochester the toll board is owned and operated by the New York Telephone Company. All local or exchange traffic is handled by this corporation." You mean by that, by the Rochester Telephone Corporation, do you not?

A. Yes, sir.

Q. And the Rochester Corporation likewise handles all toll traffic originating and terminating within its own territory with the exception of certain toll traffic originating at [fol. 238] Rochester which is handled by the New York Telephone Company?

A. Yes, sir.

Q. Will you explain that, if you please? Explain that situation.

A. Well, Canandaigua is a locality within our territorial borders. Bockport, and adjacent village, is another community within our border. We own the toll line between those two exchanges, so that we can complete a toll call between those two towns with our own facilities. However, if a subscriber in Canandaigua wishes to talk to New York City, that message is routed over our line to the Rochester toll board, and from there on it is handled by the New York Telephone Company over its facilities.

Q. The Rochester Telephone Corporation has no toll switchboard in the city of Rochester at all, has it?

A. No, sir.

Q. All the tolls, even the intra-territorial tolls or local tolls originating in Rochester or terminating in Rochester, are handled through the New York Telephone Company's toll board, is that correct?

A. That is correct.

Q. You also state in the following paragraph that as to business originating or terminating outside of Rochester Telephone Corporation's territory——

A. (Interrupting.) You perhaps refer to what is termed there as an A-B toll call. An A-B toll call is a call which our local operator completes, or rather makes a ticket for, and [fol. 239] the New York Telephone Company toll operator at her switchboard merely puts up the connection. In that case we pay the New York Telephone Company a much smaller amount for handling a call of that character than if the New York Telephone Company toll operator made out the ticket and completed the call.

Q. As to the toll business at Rochester which is intra-territorial, all of the business except the so-called A-B tolls which are handled by the Rochester Corporation operators, is handled by the New York Telephone Company?

A. Correct.

Q. There are A and B tolls handled by the Rochester Corporation operators from which the New York Telephone Company receives a commission or percentage, isn't that true?

A. For switching, yes, sir.

Q. Does your company maintain any records at all that show separately the amount of revenue or commission from interstate business?

A. Yes, we maintain a record showing the amount of long distance traffic we originate which goes out on the Bell lines. Is that what you mean?

Q. Yes.

A. Yes, we have such a record.

Q. In answer to Question 4 there, you state that no records are maintained which show separately the amounts of revenues or commissions derived from interstate business.

A. That has reference to our financial report, but I can [fol. 240] furnish a split of that if you desire.

Q. I was wondering how, without keeping a separate record as to the amount of revenues or commissions, those are computed and paid.

A. Our financial report simply includes the net. We do not set up the gross amount billed to the public. On a call, for example, from Rochester to New York, if it is one dollar gross, we simply show our commission as revenue and not the gross amount.

Q. This traffic agreement marked Commission's Exhibit A is the only contract that you have with reference to rates and the division of charges on both the interstate and intrastate business?

A. That is correct.

Q. And all of those charges and divisions thereof are indicated in that contract?

A. Yes, sir. The contract shows the division of the gross long distance traffic originated in our territory. It indicates the amount that our corporation receives for originating, billing and collecting money for long distance traffic. It indicates a prorate or the amount of money that we receive for the use of our lines within our own territory. Another contract covers the amount which we pay the New York Telephone Company for switching and handling our own calls, that is, calls of traffic over lines in our own territory.

Q. Does that provide a division of rates for the intraterritorial calls as well as the calls made outside of the territory?

[fol. 241] A. I don't believe I understand your question.

Q. Toll service charges intraterritorially.

A. No.

Q. And in some of that intraterritorial service, the New York Telephone Company shares in the charges, isn't that true?

A. No, only to the extent of the work performed by them.

Q. Certainly. But intraterritorially?

A. Intraterritorially. We collect the full amount.

Q. Is that covered by that contract Exhibit A for identification?

A. I am not sure, but if this contract does not cover it, the only other contract which we will introduce will. It will be in either one way or the other.

Q. The reason I am asking you the question is because your reply to the questionnaire here under No. 4 under the statement as to the exchange of lines states:

"This Corporation has an agreement with the New York Telephone Company for the interchange of toll business both intrastate and interstate where one of the termini of the business is outside of the area in which this Corporation operates."

A. This contract covers that.

Q. Then there is another contract relative to service between the Rochester Telephone Corporation and the New York Telephone Company which is not included in your reply to the questionnaire?

A. This is off the record.

[fol. 242] (Off the record.)

The Witness: This other contract which will be introduced later does cover the work performed by the New York Telephone Company for the Rochester Company in connecting the intraterritorial toll business. By reason of our not having a toll board, we engage the New York Company to make those connections for us in the city of Rochester.

Mr. Nixon: I will put in evidence right now, if you want me to, that agreement, and then you will have the whole story. Do you want me to do that?

Mr. McDowell: Yes.

Mr. Nixon: Let me ask a question. Mr. Boylan, will you describe the agreement that you have just referred to in answering the last question of counsel? Who is it made between and what is the date of it?

The Witness: This agreement is made between the New York Telephone Company and the Rochester Telephone Company, and except for the provision in Article 11, it covers generally the charge which one corporation makes to the other for leased wire, leased pin rental, leased conduits, and the like.

Mr. Nixon: And it is dated January 1st, 1923?

The Examiner: Is that to be a Respondent's Exhibit or a Commission's Exhibit?

Mr. Nixon: It is in the same category as this traffic agreement.

The Examiner: That will be Commission's Exhibit B.

Mr. Nixon: The Commission offers that in evidence, and [fol. 243] I will explain that there are some modifications on the contract which are appended to it and appears in the form of letters as a part of the exhibit.

(The document referred to was received in evidence and marked "Commission's Exhibit B, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

The Examiner: We will have to adjourn now.

(Discussion off the record.)

The Examiner: We will adjourn until Thursday, January 16th, at 10 o'clock.

(Whereupon, at 5.00 o'clock p. m., an adjournment was taken until Thursday, January 16, 1936, at 10 o'clock a. m.)

[fols. 244-246] January 14, 1936.

To: Federal Communications Commission.
From: Ward and Paul.
Subject: Correction in transcript of hearing on Docket 3293, Petition of Rochester Telephone Corporation, Rochester, N. Y., January 8, 1936.

Page 183, last line, fo-rth word, Change "Wednesday" to "Thursday".

O.K.

[fol. 247] Before Federal Communications Commission, Washington, D. C.

January 16, 1936

Docket No. 3293

In the Matter of Petition of Rochester Telephone Corp., Rochester, N. Y., to Determine Whether This Company Comes under Jurisdiction of the Commission

The above-entitled matter came on for hearing before Chief Examiner Davis G. Arnold, in Room 1413 Post Office Building at 10 o'clock a. m.

Appearances

On behalf of the Commission: Frank Roberson, Esq., Assistant General Counsel, and James L. McDowell, Esq., Attorney.

On behalf of the Rochester Telephone Corporation: T. Carl Nixon, Esq., 31 Exchange Street, Rochester, New York.

On behalf of the United States Independent Telephone Association: Alfred L. Geiger, National Press Building, Washington, D. C.

[fol. 248] Colloquy

The Examiner: You may proceed, Mr. McDowell.

Mr. McDowell: Mr. Examiner, I wish to correct the record of January 8th, 1936, as follows:

On page 178, line 19, the word "inter-territorial" should be "intra-territorial."

The Examiner: I understand Counsel for the Commission desires to have the record so corrected. Is there any objection on the part of the Counsel for the Respondent?

Mr. Nixon: None, Your Honor.

The Examiner: The correction may be made.

Mr. McDowell: On page 179, line 8, the word "interterritorial" should be changed to "intra-territorial."

The Examiner: Is there any objection?

Mr. Nixon: No objection.

The Examiner: It stands corrected.

Mr. McDowell: On page 180, the second line from the bottom, the word "interterritorial" should be changed to "intra-territorial."

The Examiner: If there is no objection, it stands corrected.

Mr. McDowell: On page 181, the second line, the word "interterritorially" should be changed to "intraterritorially."

The Examiner: If there is no objection, it stands so corrected.

Mr. Nixon: Just a moment. May I read that a second? If that word is changed then the answer "yes" in the third line should be "no."

Mr. McDowell: There is no objection to that.

[fol. 249] The Examiner: It may be so corrected.

Mr. McDowell: On the 4th line on the same page, page 181, the word "interterritorial" should be changed to "intra-territorial."

The Examiner: Is there any objection?

Mr. Nixon: No objection.

Mr. McDowell: On page 181, line 9, the word "inter-territorially" should be changed to "intra-territorially."

The Examiner: Is there any objection?

Mr. Nixon: No objection.

The Examiner: It stands so corrected.

Mr. Nixon: That is in your question there, you mean?

Mr. McDowell: Yes, that is true.

On page 181, line 10, in the answer to the previous question, the word "interterritorially" should be changed to "intra-territorially."

Mr. Nixon: No objection.

The Examiner: If there is no objection it stands corrected.

Mr. McDowell: On page 182, line 4, the word "inter-territorial" should be changed to "intra-territorial."

Mr. Nixon: No objection.

The Examiner: If there is no objection, it stands corrected.

Mr. Nixon: If your Honor please, I wish to call attention to some corrections which I wish to be made in the record of the hearing of Jannary 8th, 1936, on behalf of the Respondent.

On page 24, line 17, the word "companies" should be [fol. 250] changed to the word "company."

Mr. McDowell: No objection.

The Examiner: It stands corrected.

Mr. Nixon: On page 26, line 23, the words "bought it" should be stricken out and the words "bid in" inserted in lieu thereof.

Mr. McDowell: No objection.

The Examiner: It stands correct d.

Mr. Nixon: On page 36, line 6, he words "to be admitted" should be stricken out, an. the word "omitted" inserted in lieu thereof.

Mr. McDowell: That is all right. No objection.

The Examiner: It stands corrected.

Mr. Nixon: On page 40, the 6th line from the bottom, the word "with" should be changed to the word "were."

The Examiner: If there is no objection, the record stands corrected.

Mr. Nixon: On page 44, line 18, the last word in that line, the word "trustees" should be changed to "transfers."

The Examiner: If there is no objection, it stands corrected.

Mr. Nixon: On page 46, line 13, the word "had" should be changed to "have."

The Examiner: If there is no objection, is stands corrected.

Mr. Nixon: On page 47, the third line from the bottom, the word "increased" should be changed to "increase" and the word "and" inserted preceding the word "classification."

The Examiner: If there is no objection, it stands cor- [fol. 251] rected.

Mr. Nixon: On page 48, the 4th line from the bottom, the name "Bosch" appearing twice in that line, should be

changed to "Bausch," and wherever that name appears in the record I assume it may be corrected accordingly.

The Examiner: If there is no objection, it stands so corrected.

Mr. Nixon: On page 49, line 9, after the words "entitled to" should be added "that number."

On page 49, line 19, the name "Bosch" should be changed to "Bausch."

The Examiner: If there is no objection, it so stands corrected.

Mr. Nixon: On page 50, line 8, the name "Bernard C. Finucane" should be changed to "Bernard E. Finucane."

On page 50, line 14, the word "territory" should be changed to "City of Rochester."

The Examiner: If there is no objection, it stands corrected.

Mr. Nixon: On page 50, line 18, the name "Bosch" should be changed to "Bausch."

The Examiner: These other —, they are purely along the same line?

Mr. Nixon: There are some corrections which I think Counsel wants to discuss with me. These are very immaterial, but there are some other corrections.

The Examiner: The corrections will be made as Counsel suggests, unless I hear objections from Counsel for the Commission.

Mr. Nixon: On page 55, line 11, "a series No. B bonds" [fol. 252] should be changed to "a number of series B bonds."

On page 60, the third line from the bottom of that page, after the word "appeared" the comma should be stricken, and the word "but" changed to the word "that."

On page 61, the 7th line from the bottom, the phrase, "city which they granted" should be changed to read "franchise which the city granted."

On page 68, the 7th line from the bottom, the third word from the end of that line, the word "of" should be changed to "or."

On the same page, the second line from the bottom, the comma should be stricken and the word "the" preceding the word "same" should be stricken, so that the sentence will read "You call that same agreement the pre-organization agreement."

On page 72, line 19, the second word from the end of that line, the word "run" should be changed to "ran" and the first word on the following line "new" should be changed to "newly."

On page 81, the last line, the word "I" should be changed to "it."

On page 85, the 4th line from the bottom, the word "objection" should be changed to "object."

On page 86, the 8th line from the bottom, the figures "$35,000" should be changed to "$3,500."

On page 94, line 12, the word "called" should be changed to "callable."

On page 97, line 12, the word "today" should be stricken and the words "that way" inserted in lieu thereof; and [fol. 253] preceding the last word on that line, the words "as reported" should be inserted, so that the sentence will read, "It is stated that way in our voting trust as reported in the questionnaire, if that is what you refer to."

On page 112, the 4th line from the bottom, the word "Kodak" should be changed to "A. T. & T."

On page 119, line 15, the word "measure" should be changed to "merger."

On page 123, the 5th line from the bottom, insert the word "or" after the word "operator."

On page 142, the second line from the bottom, the "A" should be stricken, and the word, "The Examiner" inserted in lieu thereof.

On page 146, line 2, the word "to" should be changed to the word "each" and the 7th line from the bottom the word "each" inserted after the figure $1,000."

On page 147, the 3rd line from the bottom, the word "is" should be changed to "if."

On page 149, the last line, the word "business" should be inserted after the word "the" and the word "section" should be inserted after the word "classification," so it will read "The business classification section is yellow."

On page 153, line 2, "PWX" should be changed to "TWX" and on line 19 of that same page the word "his" should be changed to "its."

On page 156, the answer given by Mr. Boylan, in the middle of that page states that there were ten local directors and five Bell directors on the board of the Mountain Home Telephone Company. It now appears that Mr. Boy- [fol. 254] lan says he has investigated and finds there were

13 local directors on the board of the Mountain Home Telephone Company.

Mr. McDowell: We have no objection to that change.

Mr. Nixon: Then I ask that on page 156, line 18, the word "ten" be changed to "13" and on the next line the word "five" should be changed to the word "two."

Mr. McDowell: No objection.

Mr. Nixon: On page 159, line 9, the word "Rochester" should be changed to "New York."

The second answer from the bottom of that page will correspond then with the answer that has been previously changed by Mr. Boylan that there were 13 local directors and two Bell directors on the board of the Mountain Home Telephone Company.

On page 163, the last answer on that page, the first two and a half lines of that answer should be stricken, and the answer begin with the words "Of course."

On page 164, line 13, the words "per year" should be inserted after the figures "$30,000."

On page 168, the first word in the first line on that page, the word "wire" should be changed to "mile."

On page 173, the 6th line from the bottom, the word "but" should be changed to "as."

On page 176, the third line from the bottom, the word "Pitcher" should be changed to "Fitzhugh."

On page 177, I called attention to a change on the third last line, which I think should be made, but I will not urge my request further until counsel for the Government [fol. 255] has an opportunity to further cross examine this witness, in the hope that it may be straightened out.

Mr. McDowell: That was a question asked by Commission's Counsel, and is just the question that was asked.

Mr. Nixon: On page 178, line 7, the word "Rockport" should be changed to "Brockport."

In the next line "On long" should be stricken, and the words "We own the" inserted in lieu thereof.

On line 12 of that same page the word "reached" should be changed to "routed."

On the next line "out" should be changed to "on."

On page 180, line 5, the words "contains a note" should be stricken, and the words "includes the net" inserted in lieu thereof.

Page 180, the 7th line from the bottom, the words "and it also" should be stricken, and the words "another contract" inserted in lieu thereof.

On page 183, the 2nd line from the bottom, the word "Wednesday" should be changed to "Thursday."

Whereupon JOHN P. BOYLAN, a witness called on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified as follows:

Further cross-examination:

Mr. Roberson: Mr. Examiner, there is one matter that I would like cleared up for my own satisfaction, because I [fol. 256] was considerably in doubt, after I read Mr. Boylan's testimony, as to just what the situation was in Rochester as to the handling of the intra-territorial business of the Rochester Telephone Corporation. It may be that some of the changes in the record might clear it up, but I would like to straighten it out for my own satisfaction, because it is important.

By Mr. Roberson:

Q. As I understand, Mr. Boylan, you have been the operating head of the Rochester Telephone Corporation since its organization?

A. Yes, sir.

Q. I also understand there are approximately 94,000 stations in service in your company at the present time. I do not care anything about the exact figure. If you have it there, you might develop it.

A. That is approximately correct.

Q. Approximately how many of those stations are within the City of Rochester?

A. Eighty per cent.

Q. Eighty per cent?

A. Of the total number of stations; and 20 per cent outside of Rochester.

Q. How many central offices do you have in the City of Rochester; I mean exchanges within the city? I suppose "central offices" probably is the correct definition.

A. Seven.

Q. Seven?

Mr. Nixon: What is the "7" the number of?
[fol. 257] The Witness: Central offices.

By Mr. Roberson:

Q. Within the City of Rochester?
A. Within the City of Rochester.

Mr. Nixon: Let it be stated on the record clearly. You were asked about central offices, and you said "seven." Make a complete statement as to just what it is.
Mr. Roberson: That means the same thing.
The Witness: A central office is a telephone exchange.
Mr. Nixon: I understand you to say that you have seven central offices in the City of Rochester. Is that correct?
The Witness: That is correct.

By Mr. Roberson:

Q. How many exchanges do you have outside the City of Rochester?
A. Approximately 32 or 33.
Q. And that makes a grand total, then, of 39 or 40?
A. Approximately, yes.
Q. Mr. Boylan, my understanding was that at the first hearing it was stated—I am not sure whether it is in the record or not—that the territory of the Rochester Telephone Corporation embraced about 1,980 square miles. Is my recollection correct about that?
A. That is approximately correct.
Q. Now what counties, if any, are wholly included within the territory of the Rochester Telephone Corporation?

Mr. Roberson: The reason I am asking this, Mr. Examiner, is that we do not always have the same map referred [fol. 258] to when we get hold of this record.
The Examiner: The witness is referring to what exhibit?
Mr. Roberson: I do not care what he refers to, if he will just give me the names of the counties.
Mr. McDowell: Commission's Exhibit A.
The witness: Monroe.

By Mr. Roberson:

Q. Monroe.
A. Livingston.
Q. And parts of what other counties?

A. And parts of Wayne, Ontario, Wyoming and Genesee Counties.

Q. How about Steuben?

A. And Steuben.

Q. How about Yates?

A. I am not so sure about Yates.

Q. How about Orleans?

A. There are a couple of square miles of Orleans in the territory.

Q. That is all right. Your map would indicate it. I do not know whether it is our map or your map.

A. I am referring to the map in the traffic agreement between the New York Telephone Company and the Rochester Telephone Corporation.

Q. It is difficult for me to tell what the county lines are, and what the township lines are, and the other things on that map. That satisfies my purpose.

Now, Mr. Boylan, is Brockport a town in your territory, in which you have an exchange?

[fol. 259] A. Yes, sir.

Q. Is Dansville another town in your territory in which you have an exchange?

A. Yes, sir.

Q. Are those two towns typical of the thirty-odd exchanges that you have in your territory? I am trying to pick out two towns for the purpose of asking the question. I just took those that I could find off the map. Is there any particular difference between Brockport and Dansville from a telephone point of view, from any other exchanges that you have?

A. I think they are comparable, but there are some larger villages than those.

Q. Now do you have any free service in an exchange area where the subscriber in a certain exchange has the privilege of free service across to and from another exchange?

A. There are such localities.

Q. We will assume a company as large as this; a subscriber in one exchange does not have free service all over the territory of the Rochester Telephone Corporation, does he?

A. No, sir.

Q. If a subscriber in Brockport calls a person in Dansville, how would that call be handled?

In other words, where is the toll board on a call from Brockport to Dansville?

A. I believe that call would go through Rochester.

Q. You have then, I assume, certain regional operating [fol. 260] centers for your toll business?

A. Yes, sir.

Q. Rochester, of course, being the principal operating point. Now that call goes from Brockport to Dansville through Rochester. This leads up to the point I am particularly interested in, as to the toll board that it goes through or is switched to and from in Rochester. Would you explain that for the record?

A. A subscriber in Brockport calling a subscriber in Dansville would call in, of course, through his own Brockport exchange operator. She would connect with the toll board owned by the New York Telephone Company in the City of Rochester on which our Rochester Telephone Corporation line between Rochester and Brockport is connected.

Q. Well, now, that is the point I wanted to bring out, Mr. Boylan. I was afraid that what seemed to be a fact in the record was wrong. Do I understand that the intra-territorial toll business of the Rochester Telephone Corporation is switched through a toll board of the New York Telephone Company?

A. Part of the intra-territorial business that is in and around Rochester.

Q. Well, Brockport, from this map, is on the very border line of the Rochester Telephone Corporation, and so is Dansville.

A. I am not familiar with the way all of these lines are routed. It may be possible that that line would be routed down through Leroy and over our own facilities exclusively, but in order to give you an illustration of two different [fol. 261] types of calls, let us assume that this call is routed through Rochester, in which case the New York Telephone Company makes the connection for us, because the Rochester Telephone Corporation have no toll board in the City of Rochester.

Q. That is the point. Then the Rochester Telephone Corporation is not able to complete all toll calls originating in and terminating in its own territory?

A. Correct.

Q. You have to use the facilities of the New York Telephone Company in order to complete some portion of your toll business which originates and terminates within your own territory?

A. Yes, in the vicinity of Rochester.

Mr. Roberson: Well, now, Mr. Examiner, that, to my mind, is so important that I think the witness better be as definite as possible. He says "in the vicinity of Rochester," and I would like to get it definitely.

The Examiner: What do you mean by "in the vicinity of Rochester"? That is the only place that the Rochester Telephone Corporation does any business, is in the vicinity of Rochester, is it not?

The Witness: No, no. Our territory runs 50 miles to the South.

The Examiner: Counsel's question is: Can the calls on any part of your system be completed by your facilities?

The Witness: Yes, a great many of them can.

The Examiner: Are here any that can not be completed on the facilities of the Rochester Telephone Corporation [fol. 262] and have to be completed on the system or facilities of the New York Telephone Company?

The Witness: There are some calls which it is necessary to connect through the toll board owned by the New York Telephone Company in the City of Rochester.

The Examiner: Now will you enumerate for the record what calls originating on your system have to be completed through the system of the New York Telephone Company?

Mr. Nixon: Pardon me just a moment. I think there is a little misuse of the language, and I am perfectly honest in trying to keep this record straight.

The Examiner: Let him answer the question.

Mr. Nixon: I am going to object to the question in this form as being ambiguous, uncertain, and as irrelevant and immaterial.

Mr. Roberson: You do not know whether it is ambiguous to the witness or not, Mr. Nixon.

Mr. Nixon: Just a moment, Mr. Roberson. I think you are just as interested as I am in getting the true fact. I object to the use of the word "completed." The participation of the New York Telephone Company in the transactions you are talking about is a switching operation, that is all. The wires, and so forth, are used by the Rochester

Telephone Corporation. I object to the use of the word "completed."

The Examiner: Read the question.

(The question was read by the Reporter.)

The Examiner: The objection is overruled. Let him answer the question.

Mr. Nixon: Exception.

[fol. 263] The Examiner: The exception is noted.

The Witness: All calls originating or terminating in the City of Rochester to points within the Rochester territory, or from points within the Rochester territory, are switched through the toll board of the New York Telephone Company in Rochester.

By Mr. Roberson:

Q. Then, Mr. Boylan, you are not able to complete, upon your own facilities, and without the use of the facilities of the New York Telephone Company, 80 per cent of traffic that may arise from your subscribers; is that a fact?

A. Oh, there is a vast difference between the number of toll calls and the proportion of subscribers in the City of Rochester to the outside area.

Q. As a matter of fact, due to the density of the business in Rochester, the figure would be higher than 80, would it not?

A. I could not say as to that.

The Examiner: Could you give it to us approximately?

The Witness: No, I do not have that breakdown in the record of tolls. I could possibly secure it.

By Mr. Roberson:

Q. I want to state the situation as I understand it, and if I am in error, will you correct me?

My understanding then is that the Rochester Telephone Corporation does not have a toll board of its own in Rochester?

A. Correct.

Q. My understanding then is that when a toll message [fol. 264] originates in some place in your own territory, and comes into Rochester, that that is switched to the toll board of the New York Telephone Company from your circuits; is that correct?

A. Correct.

Q. And that the same thing is true on a call originating in Rochester which is to terminate somewhere in the territory of the Rochester Telephone Corporation, that comes from a subscriber's station in Rochester, and is switched by you to the toll board of the New York Telephone Company?

A. Correct.

Q. What kind of a circuit then obtains from the New York Telephone Company's switchboard on an outbound call from Rochester to, we will say, Brockport, for illustration. Does the circuit from Brockport to Rochester come in to the toll board of the New York Telephone Company?

A. It does.

Q. Do you know of any other independent telephone company that is unable to complete toll calls originating and terminating within its territory with its own facilities, but must use the facilities of some second telephone company?

A. I do not know whether any other telephone company had the same problems that we had.

Q. Do you know of any other telephone company——

A. Permit me to answer, please.

Q. Answer my question, and then make your explanation. Do you know of any other telephone company that uses the facilities of any Bell subsidiary to complete a call originat- [fol. 265] ing and terminating in the territory of the independent company?

Mr. Nixon: Just a moment. I object to that question as incompetent, immaterial and irrelevant, and further on the ground that it assumes facts which are not true. My specific objection on the latter ground is that it assumes that the Rochester Telephone Corporation is a Bell subsidiary. That is the whole issue in this lawsuit.

Mr. Roberson: Read the question.

(The question was read by the reporter.)

The Examiner: Objection overruled.

Mr. Nixon: Exception.

The Examiner: The exception is noted. The witness will answer the question.

Mr. Roberson: I want this clear. I understand this witness to say that this independent company did have to use the facilities of the New York Telephone Company in order to complete its toll messages within its own territory. Then

the question asked was: I wanted to know if he knew of any other independent telephone company anywhere in the United States that used the Bell System switchboard, toll board, in order to complete a toll message within the territory of the independent company.

The Witness: There are possibly some similar cases. I do not recall any.

The Examiner: Do you know of any such cases?

The Witness: Not from my memory. I think, however, there is a case in the City of Jamestown, New York. I am not positive about it. I will have to check it up.

[fol. 266] By Mr. Roberson:

Q. But, Mr. Boylan, this Jamestown situation is a situation that developed along with this Rochester Telephone Corporation, is it not?

A. It was consolidated about the same time.

Q. And was a part of the general change that took place at the time, as I remember the testimony the other day?

A. It was connected, there was a triple consolidation——

Q. (Interrupting.) And the Bell Company——

Mr. Nixon: Let him finish his answer, Mr. Roberson. The record is going to look very bad unless you permit him to answer.

The Examiner: Complete your answer, Mr. Boylan.

A. There was a triple consolidation including the territory of the Jamestown Telephone Company in Jamestown and the New York Telephone Company in the same territory, also including the Bell Telephone Company of Buffalo, and the Frontier Telephone Company in the locality in and around Buffalo; and the Rochester Telephone Company and New York Telephone Company in the territory tributary to Rochester.

Q. Is the Jamestown Telephone Company still in existence?

A. It is.

The Examiner: Might I ask the witness this question?

By the Examiner:

Q. Have you here a plan of the wiring of the Rochester Telephone Corporation, showing what wires of the Roches-

[fol. 267] ter Telephone Corporation and the New York

Telephone Corporation are used in the completion of calls which are placed by subscribers of the Rochester Telephone Corporation?

A. I do not believe that such a wiring plan is necessary, Your Honor. I think that the general statement which I made, that all calls originating or terminating in the City of Rochester are switched in the toll board of the New York Telephone Company in Rochester, covers it.

Q. Have you such a plan? My question is whether you have such a plan.

A. Anything that is of an intricate nature, of course, is sketched on blueprints and other drawings, but there is nothing intricate about this.

Q. My question is: Have you such a plan, an engineering plan, showing what wires are used by the Rochester Telephone Corporation in the transmission of messages received from its subscribers, whether they are Rochester Telephone Corporation wires or New York Telephone Company wires or not? Have you that plan here?

A. No, sir.

Q. If you have such a plan, the wires of the Rochester Telephone Corporation are represented in one color, are they not, and the wires of the New York Telephone Company are represented in another color?

A. Something of that sort.

Q. Is it not possible for you to furnish to the Examiner such a plan?

A. We refer to that as a circuit diagram, and it will be possible to submit it.

[fol. 268] The Examiner: I will ask that that be furnished and become a part of this record. Counsel may proceed.

Mr. Nixon: Just a moment. Do I have anything to say about whether we produce such a thing or not?

The Examiner: Yes, you can object to it.

Mr. Nixon: I will not object to that if you give me a chance to ask the witness about it. I will not object to the production of it, perhaps, until we find out what it is that we are asked to produce.

Mr. Roberson: Mr. Examiner, you have in mind the toll situation when you speak of the plan.

The Examiner: The whole system, all the wires that are used by the Rochester Telephone Corporation in the completion of calls within its system, and which pass through other wires belonging to any other company.

Mr. Nixon: Now, if Your Honor please, I object to the request and order that the Rochester Telephone Corporation be required to furnish this wire diagram which Your Honor has described, on the ground that it imposes an unreasonable and unnecessary burden on the Rochester Telephone Corporation and is wholly unnecessary for the purpose of this hearing, in view of the testimony already given by this witness.

The Examiner: Do I understand Counsel to state that the Rochester Telephone Corporation is unwilling to furnish to the Examiner of the Commission a plan, chart, or however it is described, of the wiring system showing the wires used by the Rochester Telephone Corporation in the completion of calls which originate within their system, and terminate within their system?

[fol. 269] Mr. Nixon: No, Your Honor, I am not so foolish as to indicate I am not willing to comply in any way all I can with the suggestions of the Examiner, nor to cooperate in every way that I can to the end that the true situation may be brought out in this investigation. I merely wish to point out that, as the Examiner has stated the proposition, it requires us to furnish a chart or a diagram showing the entire wire system of the Rochester Telephone Corporation and those of the New York Telephone Company which are used in completing the toll calls within the Rochester territory, and my claim is that that requires a vast amount of work and imposes upon us a whole lot of unnecessary and unreasonable burden. I am quite willing to cooperate with the Commission to the end that we may get up some modification of what Your Honor has in mind, to show what wires of the Rochester Telephone Corporation connect to the switchboard of the New York Telephone Company and what wires, if any, of the New York Telephone Company are used in the calls which the witness has been asked about.

I do not think we should be required to give a diagram of the entire telephone system, with its thousands of wires or circuits involved.

The Examiner: It is my understanding, from the witness' answer to the Examiner's question, that this plan is already prepared, and in order to comply with the Examiner's request, all that will be needed will be for the Rochester Telephone Corporation to make a print of that plan.

The Witness: Your Honor, you stated a few moments ago that you would like the plan to show the Rochester Tele-

[fol. 270] phone Corporation lines in one color, and the New York Telephone Company or American Telephone and Telegraph lines in another color. We can furnish the record of the toll lines of the Rochester Telephone Corporation, but I believe you can get the record from the New York Telephone Company and American Telephone and Telegraph Company that applies to their lines.

Mr. Nixon: You said, "We can not furnish the record of the toll lines of the Rochester Telephone Corporation." You mean the New York Telephone Company?

The Witness: No, that is not what I said.

Mr. Nixon: Read the answer, Mr. Reporter.

(The answer was read by the Reporter.)

The Examiner: Did you want to change that?

The Witness: I say we can furnish the records of the toll lines of the Rochester Telephone Corporation.

Mr. Nixon: I thought you said "can not". That is all right.

The Witness: I believe you can get the record from the New York Telephone Company and American Telephone and Telegraph Company, because they come under your jurisdiction. We do not have those records.

The Examiner: The Examiner is desirous of obtaining from the Respondent, the Rochester Telephone Corporation, a wiring circuit plan showing those wires which are used in the transmission of toll calls which originate on the system of Rochester Telephone Corporation and are completed on the system of the Rochester Telephone Corporation, but which go over, enroute, the wires or circuits of the New York Telephone Company.

[fol. 271] Mr. Roberson: Mr. Examiner, if you substitute the word "circuits" for the word "wires" you will eliminate a lot of the possible misunderstanding that might occur. A telephone man says a "wire" does not mean anything much.

The Examiner: We will change that.

The Witness: Your last sentence there, I think you want to recast it. That is, as to what you mean by going over the wires of the New York Company.

The Examiner: You can furnish such a plan?

The Witness: Yes, sir.

The Examiner: Regardless of whether or not the wires of the New York Telephone Company are leased to the

Rochester Telephone Corporation, the service over said wires or circuits is made in each individual call.

The Witness: Yes.

The Examiner: Because, nevertheless, they are the wires of the New York Telephone Company and are on the poles of the New York Telephone Company, are they not?

The Witness: Yes, sir.

The Examiner: That is all. Next question, please.

By Mr. Roberson:

Q. Mr. Boylan, does the Rochester Telephone Corporation pay a commission or charge to the New York Telephone Company on each one of these calls which originate in your territory and end in your territory, that have been switched through the New York Telephone Company switchboard in order to complete your call?

A. The Rochester Telephone Company pays a switching charge only to the New York Telephone Company.

[fol. 272] Q. I said "commission." I should have said "switching charge." How much is that per message?

A. 24.08 cents per originating message.

Q. Well, do not you have many calls, toll calls, within your territory, where the toll charge would not be as much as—what was that figure you gave there, 24 cents?

The Examiner: 24 cents plus.

The Witness: 24 cents. Will you let me finish?

By Mr. Roberson:

Q. 24 cents we will call it.

A. Yes.

Q. Do not you have many toll calls within your territory where the total does not amount to as much as 24 cents?

A. Well, if you let me continue that—of course you asked me only about a toll message.

Q. Yes, sir.

A. That in a broad sense, is a long distance message. Now, we have such a call as an A-B toll, that is one which is within a radius of, say, 40 or 50 miles. In that case the call does not go to the New York Telephone toll center for completion; it only goes there for switching; and in that case the New York Telephone Company is paid 2½ cents for completing each originating message.

Q. We will go back then to Brockport and Dansville. If a person in Brockport wants to talk with a person in Dansville, I understood that that call would come to Rochester and be switched by you to the toll board of the New York [fol. 273] Telephone Company, and that you pay a switching charge to the New York Telephone Company for the service which it performs, which is necessary in order to get the call through. How much is that switching charge?

A. That all depends on the character of the call.

Q. If I am in Brockport and want to call Dansville, I am speaking off, I do not care whether it is a person or persons——

A. I am quite sure that is considered an A-B call.

Q. I do not care what you call it. How much do you pay the New York Telephone Company?

A. In the case of an A-B call it is 2½ cents.

Q. In what other situation would you pay more than that, whether that be an A-B or X-Y call, or whatever you call it?

A. If a subscriber in Brockport called New York City——

Q. I am not interested in outside. That is the thing I want to clear up. I want to stay intra-territorial, Brockport to Dansville.

A. I am quite sure that would be an A-B call, and we would pay the New York Company 2½ cents for making that switch.

By the Examiner:

Q. What is an A-B call?

A. An A-B call is a call which we can better describe as originating in the City of Rochester and the exchange, or A operator on the Rochester Telephone switchboard makes the ticket, and completes the call, and the only function of the New York Telephone Company at its switchboard is to [fol. 274] make the connection or switch the call.

Q. What is the purpose of the New York Telephone Company making the switch?

A. It is for the same reason that it was impractical to have two telephone systems in the City of Rochester, both from the standpoint of the public and from the standpoint of the telephone companies. It is also impractical to have two toll switchboards in the same city, because you can readily see that calls coming in from the outside, it would be difficult to know which toll board they may go to. Therefore it seemed the economical and practical thing to do was

to have one toll board operated be either one company or the other. In as much as the New York Telephone Company handle the major part of the tolls, the toll board is located on their property, or rather in property rented to them, and we arrange, through a contract with the New York Telephone Company, for it to do whatever switching is needed to complete the toll calls which we originate and terminate over our own lines.

By the Examiner:

Q. Have you a copy of that contract here?
A. It has been submitted in evidence, Your Honor.

By Mr. Roberson:

Q. Mr. Boylan, are there any toll calls within your territory which you complete with your own facilities?
A. Yes, sir.
Q. Describe those, and tell us what the amount of that business is.
A. A toll call completed with our own facilities could be made between Dansville and Naples, that is the southern [fol. 275] part of the territory.
Q. All right.
A. Or between Nunda and Warsaw. Nunda is the extreme southern exchange in our territory, and Warsaw is somewhat northwest of there.
Q. You mean then that you have toll circuits between Dansville and Naples and toll circuits between Nunda and Warsaw?
A. Yes, and between Warsaw and Geneseo, and between Geneseo and Mount Morris.
I am giving it from the south, up the Genesee Valley, those exchanges in our territory that are not in the immediate vicinity of Rochester. We have our own toll lines connecting these exchanges with each other.
Q. Suppose you wanted to make a call between Nunda and Dansville?
A. We have a direct line of our own between those two points.
Q. How would it be between Naples and Nunda? Can you complete that call?
A. Yes, through Dansville.

Q. How about Brighton and Pittsford, which seem to be on the outside of Rochester, both of them? How would that call be handled?

A. We have no exchange in Brighton.

Q. Just strike out the question, then. It seems that you haven't an exchange there.

A. Take East Rochester and Fairport.

Q. Is East Rochester a part of Rochester?

[fol. 276] A. It has a separate telephone exchange.

Q. Is it a city or municipality?

A. It is a village.

Mr. Nixon: Not a part of the City of Rochester.

Mr. Roberson: Then it might as well be in any other name.

By Mr. Roberson:

Q. In a call from East Rochester to Pittsford there would be a toll charge would there not?

A. I am not so sure about that.

Q. You mean there may be free service?

A. I think it is. But between Fairport and Rochester——

Q. (Interposing:) I do not want to get between Fairport and Rochester, I want to get two towns outside of Rochester. How about Mortimer? Is that an exchange?

A. No, sir.

Q. How about Cold Water, do you have any exchange there?

A. No, sir.

Q. How about Henrietta?

A. Henrietta is a theoretical exchange.

Q. What is Webster?

A. Webster lies to the northeast of Rochester.

Q. Does it have an exchange?

A. It has an exchange.

Q. Fairport has an exchange?

A. And Fairport. We can connect between those two [fol. 277] with our own facilities, without going through the Rochester toll board.

Q. You can connect between those two with your own facilities without going through the Rochester toll board?

A. Yes, sir.

Q. I got the impression that you can complete a call on your own facilities around the outer limits of your territory.

A. I think it would be fair to state that we can connect

a call between two of our exchanges outside of the City of Rochester in the majority of cases without coming through the Rochester toll board.

By the Examiner:

Q. What percentage of the toll calls received on your system and delivered on your system are completed through on your system?

A. For the year 1935, there were a total of 868,000 toll calls originated in the territory of the Rochester Telephone Corporation. Of that number 221,000 were handled by the Rochester Telephone Corporation in their entirety.

Mr. Nixon: For what year was that, Mr. Boylan?

The Witness: 1935.

By the Examiner:

Q. And how were the others handled?

A. The others were handled through the toll board of the New York Telephone Company located in Rochester.

Q. Now, in compensating the New York Telephone Company for the handling of, in round numbers, 600,000 toll [fol. 278] telephone calls, this was done in accordance with a contract with the Rochester Telephone Corporation and with the New York Telephone Company?

A. The compensation which the New York Telephone Corporation received, in so far as those 600,000 calls were received, is covered in the traffic agreement which has been placed in evidence.

In other words, I might simplify the whole situation by making this statement, that all of the commission which the Rochester Telephone Corporation receives on toll calls originated in its territory, and all the extra commission it receives for operating such toll calls, and all the prorate it receives, which means the payment for the ownership of its lines, within its territory, and the use of them in connection with one of these calls, those are three general heads, all those commissions and payments are covered in the trafic agreement.

The other agreement which we placed in evidence, we will term it the facilities agreement, and that agreement provides for the payment we make to the New York Telephone Company for performing services for us in connec-

tion with switching calls at their toll switchboard in the City of Rochester.

Q. And by "switching calls" you mean handling calls?

A. Yes, sir.

Q. The term "switching" means the handling by the New York Telephone Company of these toll calls over its system?

A. Correct.

[fol. 279] Q. Back again to your system?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

By Mr. Roberson:

Q. Mr. Boylan, taking this total of 868,000 toll calls which you said originated in the Rochester territory, do I understand that all of those calls terminated in the Rochester territory, or did part of them go to other parts of the country?

A. No, they only originated in the Rochester Corporation territory.

Q. Out of this 868,000 total toll calls which originated, I understood you to say, 221,000 of them were exclusively and completely handled by you on your own facilities; is that right?

A. Yes, sir.

Q. That leaves 647,000. What I want to know is, are all of those calls within the Rochester Telephone Corporation territory, both originating and terminating, or is it a fact that part of them originated and terminated in the Rochester territory, and part of them originated in the Rochester territory, and terminated all over the United States and in other parts of the world?

A. This 600,000 calls, in round figures, that you refer to, originate in our territory and go outside of our territory, are completed outside of our territory.

Q Then do you have any statistics that show how many toll calls originate in your territory and are switched [fol. 280] through the New York Telephone Company toll board?

The Examiner: That was my question.

The Witness: Perhaps this will answer your question. For the year ending in 1935, the New York Telephone Com-

pany switched for the Rochester Telephone Corporation 284,579 messages. Those were A-B messages, and they also switched 122,519 toll messages other than A-B.

Q. I wonder if you would use my term for a minute in place of yours. You use the term of A-B. Won't you use language that I can understand, and tell me how many of the 868,000 toll calls began and ended in the Rochester territory, and that the New York Telephone Company had something to do with?

Now leave the letters off.

The Witness: Will you read that question?

(The question was read by the Reporter.)

A. I may be able to get that information for you later. I do not seem to have it here at the present time.

Q. I understand that we are dealing with a grand total of 868,000 toll calls that originated in the Rochester territory and started somewhere; that is correct, is it not?

A. They all originated in the Rochester territory.

Q. And they were destined for some point?

A. Yes, sir.

Q. I understood you to say that 221,000 of those were completed entirely with your own facilities.

A. That is correct.

Q. Well, that leaves approximately 647,000 which the New York Telephone Company had something to do with.

[fol. 281] A. They had all to do with.

Q. No, no. If you originated them they did not have all to do with them.

A. I mean so far as completing them is concerned.

Q. Mr. Boyland, I am just trying to get some reasonable understanding of this thing. Of this 647,000 calls, how many of them stayed inside of the Rochester territory, and how many of them went outside of your Rochester Telephone Corporation territory?

I do not care anything about exactness.

A. All right. The two hundred and some thousand stayed within the Rochester territory.

Q. Of the 647,000?

A. Of the total. No, of the total 800,000, and the balance, or the 600,000 went outside of the Rochester territory.

Mr. Nixon: "All of them." That is the question.

Mr. Roberson: All of them.

The Witness: All of them, yes.

Mr. Roberson: Now, Mr. Nixon, that creates an absurdity. That would mean the Rochester completes every one of the calls in its own territory, and he said that they had not done so. He said that the Rochester Telephone Corporation originated 868,000 toll calls in 1935.

Mr. Nixon: That is right.

Mr. Roberson: He said that part of that 221,000 of those toll calls were completed by the Rochester Telephone Corporation with its own facilities.

Mr. Nixon: That is right.

[fol. 282] Mr. Roberson: All right. He has heretofore testified that there is considerable toll business within the Rochester territory, that it must switch to the New York Telephone Company before it can complete the call within the territory of Rochester.

Mr. Nixon: He said there were some.

The Examiner: That is what we are trying to find out. How much? That is the point. In answer to my question he said six hundred thousand. Then later on it developed that his answer was not in accordance with my question. Now we want to know of that 600,000 toll calls, in round numbers, which are completed with the assistance of the New York Telephone Company, how many of them terminated in the territory of the Rochester Telephone Corporation.

Mr. Roberson: That is right.

The Witness: Of the six hundred thousand?

The Examiner: Yes.

The Witness: None of them.

The Examiner: None of them?

The Witness: None of them.

By the Examiner:

Q. So then, according to your answer, Mr. Boylan, the New York Telephone Company does not handle any toll calls which start within your territory and are completed within your territory?

A. I did not say that, Mr. Examiner. I said that there are some calls within our territory that the New York Telephone Company handle at their switchboard.

[fol. 283] Q. How many are there? That is the very point we are after.

A. I haven't got a breakdown of that.

Mr. Nixon: Are they included within that 221,000? That is what they want to know.

The Examiner: No, it is not.

The Witness: I could not say as to that.

The Examiner: We do not want to get that.

By the Examiner:

Q. The question that I asked you about an hour ago, which you answered, is the question we would like to have answered correctly, and that is how many of this total 800,000 calls, toll calls, that are handled by the Rochester Telephone Corporation in their inception are completed by the Rochester Telephone Corporation, but between their inception and their completion, are handled by the New York Telephone Company? You answered that question by saying 600,000. Now then later in answer to Judge Roberson, you changed your answer and said that 600,000 was the total number of toll calls handled by the New York Telephone Company from the Rochester Telephone Corporation to all sources, both in and without, both going within and without the territory of the Rochester Telephone Corporation. Now then, can you give us this information?

The Witness: I would like to have the stenographer read my answer to that original question.

The Examiner: Read the original question, Mr. Reporter.

(The question was read by the reporter as follows:

[fol. 284] "What proporation of the toll calls received on your system and delivered on your system are completed throughout on your system?")

The Witness: What was my answer to that?

(The answer was read by the reporter as follows:)

"For the year 1935 there were a total of 868,000 toll calls originated in the territory of the Rochester Telephone Corporation of that number 221,000 were handled by the Rochester Telephone Corporation in their entirety.")

By the Examiner:

Q. What percentage of the toll calls were received on your system and delivered on your system?

We have no record of the toll calls received.

Q. In your answer you said there were 800,000. Then you go on and state that 200,000 of those were completed over your own system. The question was, how many calls were received and delivered on your system.

A. By "received," your Honor, do you mean the calls which come into our territory from the outside?

Q. No, sir. A call originating on your system is a call that is put on the telephone which is within your jurisdiction and which you expect to make a charge for. A call delivered on your system is a call which is delivered on a telephone within your territory. Now how many telephones——

A. Just a minute. Let me get your last question straight. You say a call originating on our system is a call that is made from our system and goes out from our system. Now what do you mean by a call delivered?

[fol. 285] Q. Terminated. You did not understand the word.

A. No, I did not understand the word.

Q. Let us go back and change the word "delivered" to "terminated." A telephone call received on the telephone within your system, which is a toll call but which, nevertheless, is terminated on a telephone within your system, how many of such toll calls between the receipt of the call and the termination of the call that go over the wires or through the switchboard were in any way handled by the New York Telephone Company during the year 1935?

A. We have no record of calls terminating in our territory from outside.

Q. I am not talking about outside. These are calls which originated within your system and terminated within your system, but which are handled somewhere between the origination and termination by the New York Telephone Company, the toll calls.

A. I believe I can only give the same information I gave before, that for the year 1935 868,000 calls were originated in our territory. Of that number we completed, that is, the Rochester Telephone Corporation completed——

Q. Over its own system?

A. Over its own system.

Q. Without any assistance from the New York Telephone Company?

A. That is correct. (Continuing previous answer.) —221,000.

Mr. Roberson: Now I think the witness must be a little [fol. 286] confused, Mr. Examiner. Let me see if I can help him out a bit.

By Mr. Roberson:

Q. Out of the 838,000 calls, some of those calls went to New York City, did they not, and to Chicago and Washington?

The Examiner: Those are long distance calls.

Mr. Roberson: I am not talking about anything excepting long distance. All these calls are toll messages.

The Witness: That is correct.

Mr. Nixon: This whole 868,000 are long distance?

Mr. Roberson: That is right.

By Mr. Roberson:

Q. I said part of the 868,000 went to New York, Chicago, Washington, and everywhere else.

A. Probably.

Q. Part of them stayed within the Rochester territory?

A. That is correct.

Q. And the part of them that stayed within the Rochester territory, originated in the Rochester territory and terminated in the Rochester territory, some of those went through the New York Company switchboard, did they not?

A. Of the 868,000, yes, sir.

The Examiner: No, some of the number he is talking [fol. 287] about.

Mr. Roberson: Yes, the 868,000.

The Witness: Yes, some of them did.

Mr. Roberson: That is what I want to know.

The Witness: I do not have those figures here at the present time. I will try and get them for you before the afternoon.

By Mr. Roberson:

Q. Then those that originated in the Rochester territory and that terminated in the Rochester territory and that were switched for you through the New York toll switchboard, you paid a 2½ cents switching charge for; is that correct?

A. We paid 2½ cents if we made the ticket. You do not like the use of the word "A-B" so I have changed it.

Q. If the other fellow made the ticket, how much was it?

A. If the other fellow made the ticket, made the connection, and followed it through, got the party on the line, it was 24 and some cents. If we made the ticket and asked them to simply make the connection for us, we paid 2½ cents.

Q. You would always try to make the ticket if there is 24 cents difference, would you not?

A. There is a little to that. It is points that are tributary to Rochester and I believe are 40 miles and under, and in the interest of speeding up the service the operator who answers the telephone of, say, the Rochester subscriber, completed [fol. 288] the connection.

Q. Then, Mr. Boylan, do you know what is the lowest, the smallest, toll charge that you might have to pay 24 and some fraction cents out of to the New York Telephone Company? There must be some bottom to that.

A. It perhaps might be 35 cents.

Q. And you may have calls where you originate the business where the toll charge would be 35 cents?

A. That is correct.

Q. Where, under your contract, you would pay 24 plus to the New York Telephone Company?

A. Per originating call.

Q. That is right.

A. With no charge for an incoming call. On the theory that incoming calls are about equal to outgoing calls, that charge would be cut in two, or twelve cents per call.

Q. Would not all calls within your territory be incoming to some point in your territory, whichever you want to call it, incoming or outgoing, in your own territory?

A. Well, we do know that there are in our own territory.

Q. Which the New York Telephone Company never heard of?

A. That is correct.

Q. You do not pay anything on them, so we can leave them out of this part of it.

Mr. Nixon: You are trying to separate the 200,000?

[fol. 289] Mr. Roberson: Mr. Examiner, I am trying to get the witness to break down the 868,000 calls.

The Examiner: He says he cannot do it.

The Witness: I will do it this afternoon.

The Examiner: He says he will do it this afternoon.

Mr. Roberson: Break it down between inter-territorial business and intra-territorial business, break it down twice,

the part that Rochester can complete 100 per cent and the other part that Rochester has to use the New York Telephone Company's circuits, and/or facilities to complete the call.

By the Examiner:

Q. Now does the Rochester Telephone Corporation handle any calls for the New York Telephone Company which calls are not completed within the territory of the Rochester Telephone Corporation?

A. Yes, sir.

Q. All right. From what point to what point does it render that service?

A. We have in the territory of the Rochester Telephone Corporation three or four toll switching centers. One is located in Dansville, which you mentioned in several instances. The New York Telephone Company lines are terminated on our Dansville switchboard and calls coming east and west, or east to west, or west to east, in that southern tier may go through that Dansville toll center office without coming through Rochester, in order to get a more direct connection.

[fol. 290] The Examiner: Now, will you read my previous question, Mr. Reporter?

(The question was read by the reporter as follows:

"Does the Rochester Telephone Corporation handle any calls for the New York Telephone Company which calls are not completed within the territory of the Rochester Telephone Corporation?")

By the Examiner:

Q. Do you understand the question, Mr. Witness?

A. Pardon me, Mr. Examiner. What was it?

Q. I want to know from you whether the Rochester Telephone Corporation receives calls from the New York Telephone Company the destination of which calls is not within your territory, that is, the call is not completed within your territory?

A. In other words, the call is routed through our territory?

Q. That is right.

A. Yes, there are such calls.

Q. Where are those calls?

A. Well, I should say a call coming from Hornell to Naples, Hornell being in the territory of the New York Telephone Company and Naples being in the territory of the Rochester Telephone Corporation, Dansville being a toll switching center——

Q. (Interrupting.) Just a minute. That call is completed within your territory, is it not?

Mr. Roberson: No.

[fol. 291] The Witness: Yes, it is. I will have to change that.

By the Examiner:

Q. I want to know where calls are not completed within your territory.

Mr. Nixon: And did not originate within your territory.

The Examiner: That is right.

Mr. Nixon: Only passed through your territory.

The Witness: Strike out my answer then. A call originating in the territory of the New York Telephone Company at Hornell for Batavia——

The Examiner (interrupting): Where is Batavia?

The Witness: Batavia is a town located in the territory of the New York Telephone Company west of our territory.

The Examiner: All right.

The Witness: I should say that call would be switched through Leroy, which is in our territory, and which is a toll switching center. Now that is a call that originates in the New York Telephone Company territory to the south of our territory and is completed in Batavia just to the west of our territory, and passes through and is switched in our territory.

By Mr. Roberson:

Q. Over whose circuits?

A. Partly over the circuits of the New York Company and the Rochester Telephone Corporation.

[fol. 292] Q. Where would your circuit be? What part of it would be your circuit?

A. Between Dansville and Leroy. Now it may be possible that the New York Company owns circuits between Dansville and Leroy, I would not be sure of that, in which case they would be routed over their own circuit.

By the Examiner:

Q. Can you tell us how many toll calls originating outside of the territory of the Rochester Telephone Corporation were transmitted by the New York Telephone Company to the Rochester Telephone Corporation system and were handled over the wires or circuits of the Rochester Telephone Corporation and terminated outside of the Rochester Telephone Corporation area, outside of the area of the Rochester Telephone Corporation?

A. No, I could not tell you the number of such messages.

The Examiner: Any further questions?

By Mr. Roberson:

Q. When was the telephone building built in Rochester, approximately?

A. Which telephone building do you refer to?

Q. The one that is your main toll building, I suppose it is.

A. It was built long before I came to Rochester, in 1921. I would have to check it up.

Q. Do you have a main telephone building down in the business center somewhere of the Rochester Telephone [fol. 293] Corporation?

A. We have two main exchanges in the business section.

Q. Are they in your own buildings?

A. In our own buildings.

Q. Were those buildings built prior to the merger or subsequent to that time?

A. Prior to it.

Q. Were they both owned by the Rochester Telephone Company?

A. One was owned by the Rochester Telephone Company and one was owned by the New York Telephone Company.

Q. In which one of those buildings is the switchboard, the toll switchboard that you must use to complete calls originating in and terminating in the territory of the Rochester Telephone Corporation?

A. That is located in the Main Exchange on 95 Fitzhugh Street, which was formerly the building owned by the New York Telephone Company.

Q. The New York Telephone Company?

A. Yes, sir.

Q. And which is now owned by the Rochester Telephone Corporation?

A. Yes, sir.

Q. Was that toll board in the building at the time of the merger?

A. It was.

Q. At the time before the merger do you know whether [fol. 294] or not the Rochester Telephone Company switched its calls, toll calls, to the switchboard of the New York Telephone Company within the territory of the Rochester Telephone Company?

A. No, there was no connection between the two prior to consolidation.

Q. The Rochester Telephone Company completed entirely its own calls with its own facilities; is that right?

A. Yes, sir.

Q. How far is the Jamestown Telephone Company from your territory, approximately?

A. 200 miles.

Q. Are you fairly familiar with that territory?

A. In a general way.

Q. Do you know whether the Jamestown Telephone Company has a similar arrangement, so far as switching calls to the New York Telephone Company between points within its territory is concerned, that you employ in the Rochester Telephone Corporation territory, or does the Jamestown Telephone Company do its own switching?

A. I believe the Jamestown Telephone Company own the toll board.

Mr. Roberson: That is all.

By the Examiner:

Q. The switchboard which is operated by the New York Telephone Company is operated by employees of the New York Telephone Company?

A. Yes, sir.

[fol. 295] Q. The instrumentalities which run from that switchboard carry the messages to places within and without your area are wires, are they not?

A. Yes, sir.

Q. Do you refer to those as circuits or as wires?

A. The wires which connect the New York Telephone Company switchboard with our various city exchanges

are called toll trunks. I believe that is what you refer to.

Q. They are wires?

A. Yes, sir.

Q. Who keeps the wires running from the New York Telephone Company board within your territory in repair?

A. Are you speaking of these toll trunks that I just described?

Q. I am talking about the wires over which the New York Telephone Company sends its messages, the messages which it originates.

A. Now let me get this straight. If you call a telephone in the city of Rochester from Washington you talk over wires owned by the American Telegraph & Telephone Company, and when you get into New York State, over the wires of the New York Telephone Company, into the switchboard owned, that is the toll switchboard owned by the New York Telephone Company, and you ask for Mr. Nixon, for example, the toll operator would plug in on what we call a toll trunk, which would connect her to the main exchange trunking operator and from the main exchange [fol. 296] out to Mr. Nixon's telephone, would be over an exchange line. Does that answer your question?

Q. No, not at all. I want to find out about these wires which run from the New York Telephone Company switchboard, which are located within the area of the Rochester Telephone Corporation.

A. The toll lines?

Q. I do not care whether they are toll lines or what they are. Are those wires owned by the New York Telephone Company or wires owned by the Rochester Telephone Corporation and leased to the New York Telephone Company?

A. No.

Q. Whom do they belong to?

A. They belong to the Rochester Telephone Corporation.

Q. And they are leased by the Rochester Telephone Corporation to the New York Telephone Company?

A. No, sir. When the attorney spoke about leased wires a little while ago he referred to the case where we would require a circuit, that is two copper wires between two points. Now if the New York Telephone Company happened to parallel our toll lines, or our pole lines, and had two vacant wires which we could lease, we might lease those wires for our purposes rather than string two additional wires.

Q. I am only interested in the wires that the New York Telephone Company uses, which wires are physically located, two wires, we will say, located within the territory [fol. 297] which your company serves. Now would those wires belong to you, or would they belong to the New York Telephone Company?

A. We both own wires in that territory.

Q. You both own wires?

A. Yes, sir.

Mr. Nixon: You do not mean that you both own the same wires?

The Witness: No, no. They would be different circuits. For example, the long line circuits coming in from out of the territory, most of those are owned, right up to the New York Telephone toll board, by the New York company.

By the Examiner:

Q. Fine. Now on whose poles are those wires?

A. Mostly on the poles of the New York Telephone Company.

Q. And who takes care of those poles and wires?

A. The employees of the New York Telephone Company.

Q. And the Rochester Telephone Corporation has nothing to do with them?

A. Nothing to do with those.

Q. Now does the New York Telephone Company lease to your company any of those wires?

A. None of the wires that are in use, no.

Q. Does it lease to you any wires that are not in use?

A. Yes.

[fol. 298] Q. Then why did you qualify it? I want to know if they lease any wires.

A. This agreement, which we call the facilities agreement, provides for the New York Company leasing their spare facilities to us, the wires, cables, and so forth, and we lease like wires and cables to them.

(Whereupon at 12:47 o'clock p. m. a recess was taken until 1:30 o'clock p. m. of the same day.)

Afternoon Session.

The Examiner: Are you ready?

Mr. McDowell: Yes.

JOHN P. BOYLAN, a witness on behalf of the respondents, having been previously duly sworn, resumed the stand and testified as follows:

Further cross-examination.

By Mr. McDowell:

Q. Mr. Boylan, has the New York Telephone Company any toll boards in the Rochester Telephone Corporation's territory other than in the city of Rochester?

A. No, sir.

Q. The toll board of the New York Telephone Company is located in the building owned by the Rochester Telephone Corporation at 95 Fitzhugh Street, Rochester?

A. Correct.

Q. Has the Rochester Telephone Corporation any facilities in that building?

[fol. 299] A. Yes, sir.

Q. What have you there?

A. We have our Main telephone exchange, the "Main" being the prefix or designation of that exchange.

Q. Where are your other exchanges located in Rochester, the central offices?

A. In the downtown district we have another exchange called Stone, so that there are two central offices in the business section of Rochester.

Q. How is your business handled between the different exchanges in the city of Rochester?

A. By means of inter-office trunks.

Q. Are they centrally connected in one of the exchanges?

A. No, sir, they go direct from each exchange to the other.

Q. In Commission's Exhibit B. the so-called facilities agreement between the New York Telephone Company and the Rochester Telephone Corporation, and particularly that part of it which is dated March 17, 1933, and fixes the amount to be paid by the Rochester Telephone Corporation to the New York Telephone Company for payment of the 24.08 cents per message ticketed at the toll board, and 2½ cents per message ticketed at the Rochester Telephone Corporation A board, and also provides for payment by the Rochester Telephone Corporation to the New York Telephone Company of the sum of $320.93 per month for tandem equipment and floor space. Will you describe,

[fol. 300] please, just what that tandem equipment is and for what purpose it is used?

A. In the so-called A-B toll calls, that is toll calls that are ticketed by the operators of the Rochester Telephone Corporation and switched by the New York Telephone Company at its toll board, the trunk lines from the various exchanges of the Rochester Telephone Corporation's switchboard terminate on what is called a tandem position on the New York Telephone Company toll board. Now it is used exclusively for our so-called A-B toll calls.

Q. Then you have no facilities of your own by which you could complete a so-called A-B toll call in the city of Rochester?

A. Correct.

Q. Where is that tandem equipment located?

A. One of the switchboard positions on the toll board is used for that purpose. When I say "toll board" I mean the toll board owned by the New York Telephone Company.

Q. Is the toll board of the New York Telephone Company used at all in the handling of the A-B tolls originating on the Rochester system?

A. Only at its tandem position that we have just been talking about.

Q. Well, that tandem equipment, although it may be attached to the toll board, is a separate equipment, is it not?

A. I should think we ought to so consider it in talking [fol. 301] about it, yes.

Q. In other words, it is not equipment that is needed by the New York Telephone Company in the handling of its general toll business, is it?

A. Not that particular position, no.

Q. This kind of equipment is used by the New York Telephone Company in the handling of interstate or extra-territorial calls, is it?

A. No, it is not. It is exclusively used for our purpose.

Q. Therefore they could get along without it except for the handling of your local A-B tolls, is that right?

A. Correct.

Q. Now it is stated in Respondent's reply to the questionnaire which is in evidence as Respondent's Exhibit 16 that, "as to toll business at Rochester which is intra-territorial, that business, except certain A-B tolls which are

handled by Rochester Corporation A operators at several central offices, is handled by the New York Telephone Company and for its services in the handling of Rochester Corporation's intra-territorial business at Rochester the Rochester Corporation pays the New York Telephone Company the fixed sum of $320.93 per month plus 2½ cents per message for messages ticketed at A boards."

Now how is that fixed sum of $320.93 fixed?

A. That includes the carrying charges on the equipment [fol. 302] plus the rental of the floor space occupied by this tandem position.

Q. That figure of $320.93 per month which is paid to the New York Telephone Company in addition to the 2½ cents per message for the handling of the calls is exactly the same amount as the contract or agreement calls for, the Rochester Telephone Company to pay the New York Telephone Company for the tandem equipment and floor space as a monthly rental.

A. Is exactly the same as what other figure?

Q. Well, the monthly rental that you agreed to pay for the tandem equipment and floor space is exactly the same amount as you pay in addition to the 2½ cents per message?

A. Exactly.

Q. For the handling of the calls?

A. Yes.

Q. Now I ask you is this $320.93 rental for floor space and tandem equipment paid to the New York Telephone Company in cash or is it a charge-off? Is it an extra payment for the handling of those toll calls?

A. Well, the whole transaction of course is figured together. That is, we are billed for so many messages per month at 24 cents and for so many messages A-B at 2½ cents, plus the $320 per month for tandem equipment and floor space.

Q. Do you furnish any of the operators, for the handling of calls, on some of this tandem eqnipment?

A. No, sir.

[fol. 303] Q. This sort of tandem eqnipment could be set up by the Rochester Telephone Corporation in any one of its own offices if it desired to do so, could it not?

A. No, sir.

Q. Why?

A. Because the tandem equipment must be adjacent to the terminal of all the toll lines.

Q. Would it not be feasible for you to have the terminal of your own toll lines in your own office?

A. We would have to extend the toll lines to every office in the city.

Q. It is only used, as you say, for the local or A-B toll business?

A. That is probably true, that it would not be necessary to terminate all of the toll lines on our own switchboards, but as I said this morning, there is a great advantage in having one central toll board.

Q. That would be one central toll board for your company for the handling of your own local business, would it not?

A. Well, there would be in addition to that the New York Telephone Company's toll board.

Q. You would not need that in the handling of the local tolls, would you?

A. There would still be two toll boards if we set up our own tollboards for our A-B calls, and if we had to have access to the other for interstate calls. You see, we have a consolidated toll board here, which is the only practical way to operate the toll business at Rochester.

[fol. 304] Q. When was this tandem equipment installed?

A. I think it was in 1932.

Q. Well, the Rochester Telephone Corporation operated from 1921 to 1932, then, without it; is that not true?

A. We did not have the A-B calls previous to that time.

Q. Now how did you handle your local toll calls?

A. They all went to the New York Telephone Company's toll board and when the A-B call system went into effect I think the saving to us, in charges made by the New York Telephone Company, was something over $40,000 a year.

Q. Well, at the time when you installed your tandem equipment you also installed your trunk lines to it, did you not?

A. That is correct.

Q. Could not you have as easily or as well installed them on tandem equipment in one of your other central offices?

A. Then we would have two toll boards.

Q. Well, you haven't any now.

A. We have one consolidated toll board at the present time. As it is now, on a long distance call, say from Wash-

ington to points in Rochester, or tributary to Rochester, it is a simple matter for the long distance operator at that end to go into the main center, say at Rochester. Now if there were two toll boards there, one for the small localities [fol. 305] in and around Rochester and another for the more distant points, it would be rather difficult for the operator at Washington to know which toll board to make connection with. So the only practical thing to do is to have a consolidated toll board.

Q. Do you know of any other city of comparable size where the same situation exists, where an independent telephone company has its tandem equipment installed with the toll board of another telephone corporation or company?

A. There are undoubtedly several instances.

Q. Do you know of any?

A. I do not recall of any at the present moment.

Q. Now referring to Commission's Exhibit A, which is the traffic agreement between the New York Telephone Company and the Rochester Telephone Corporation effective January 1, 1929——

Mr. McDowell: If I may state here, this has been offered in evidence, or has been identified for the purposes of identification only. I would like to offer it in evidence at this time.

Mr. Nixon: No objection.

The Examiner: It has never been offered before?

Mr. McDowell: I understood that it was. It was offered the last day we were on hearing here, but the record does not so show.

Mr. Nixon: My recollection is the same as counsel's your Honor. It was identified but never offered in evidence. I have no objection to its now being received.

The Examiner: We have got Government's Exhibits A [fol. 306] and B now.

Mr. McDowell: The record does not show it had been offered in evidence.

The Examiner: Page 169 of the record, agreement with the Rochester Telephone Company and the New York Telephone Company with reference to furnishing the facilities and interchange of telephone service. Isn't that it?

Mr. McDowell: Yes.

The Examiner: Then it was introduced on page 169, marked Government's Exhibit A. Is that right?

Mr. Nixon: Mr. McDowell said "I ask it be marked." You said "Have that marked Commission's Exhibit A," and the same was so marked. I do not know whether that constituted it being in evidence or not.

The Examiner: Well, it is already in.

(The document referred to was received in evidence, marked "Commission's Exhibit A, Docket No. 3293," and is filed with the transcript in the possession of the Commission.)

By Mr. McDowell:

Q. Now, in Commission's Exhibit A I ask you to turn to Exhibit B and state, if you will, whether or not this traffic agreement is a standard agreement used between the New York Telephone Company and other companies, in respect to Exhibit B.

A. I believe it is.

Q. Can you state here any other independent telephone company with which the New York Telephone Company has a like agreement?

[fol. 307] A. I should say that there was a similar agreement with the Jamestown Telephone Company.

Q. Any other?

A. I could not say as to any other company, because such company would have to have a toll center within its territory in order to have Exhibit B apply. The Jamestown Telephone Company is the only one I can recall that might have such an agreement.

Q. This provides for and limits specifically, does it not, the toll operation to be performed by both the Bell and the connecting company, in this instance the Rochester Telephone Corporation?

A. I would say that Exhibit B provides for any operating that is done by the connecting company, or, in our case, it would be the Rochester Telephone Corporation, or any of its connecting companies.

Q. Well, it states, "From the effective date hereof Bell Companies shall perform all toll operating required in connection with communications interchanged under said traffic agreement, except that connecting company shall perform the toll operating required for communications originating at," naming certain cities and towns, and "terminating at" certain points.

A. That is correct.

Q. At all points not named here the Bell Company performs all the toll operating, is that not true?

A. No, that is not true. You see, this is an agreement between the New York Telephone Company and the Rochester Telephone Corporation on traffic that is handled [fol. 308] between those two corporations. Now, if we originated a toll call within our own territory on our own exchange and completed that over our own toll line going to another exchange, that has nothing to do with Exhibit B of this agreement.

Q. You mean within your territory?

A. Within our territory.

Q. Well, this agreement does not concern anything within the territory, does it, this traffic agreement?

A. Yes, it does.

The Examiner: It does concern with it?

The Witness: Yes.

By Mr. McDowell:

Q. Does this traffic agreement fix the charges on intra-territorial calls at all?

Mr. Nixon: Which agreement are you talking about now, Exhibit A or Exhibit B?

Mr. McDowell: Exhibit B.

The Examiner: Exhibit B of Exhibit A. Exhibit B is a subdivision of Commission's Exhibit A.

Mr. Nixon: Yes.

The Examiner: This witness cannot change the verbiage of that agreement, which says specifically, "from the effective date hereof the Bell Company shall perform all toll operations required in connection with the communications interchanged under said traffic agreement, except A" and then it goes on and gives exceptions. Now, where is that traffic agreement?

The Witness: This is the traffic agreement.

[fol. 309] By Mr. McDowell:

Q. Now, this traffic agreement does not fix the rate charged for intra-territorial calls at all, does it?

A. No, it does not.

Q. It applies only to calls originating or terminating outside of the Rochester territory, is that not right? I mean, one end of the call is outside of the Rochester territory?

A. I would say that was correct.

Q. Now, Exhibit C following Exhibit B and contained in Government's Exhibit A, what is that?

A. Exhibit C defines the amount to be received by each company for facilities furnished and service rendered.

Q. That is the standard schedule of the New York Telephone Company, is it not, in all its contracts?

A. I believe so.

Q. Now, who fixes the toll rates and division of charges of the Rochester Telephone Corporation?

A. What are you referring to now?

Q. Of the amount to be charged for toll calls.

A. Who fixes the rate?

Q. Who fixes the amount?

A. Inasmuch as there are standard rates existing throughout the State of New York and filed with the Public Service Commission for certain varying distances, the New York Company file the rates for us.

Q. The rates for service charged by the Rochester Telephone Corporation are fixed by the New York Telephone Company?

[fol. 310] A. Are filed by the New York Telephone Company.

Q. You have testified that the Rochester Telephone Corporation leases toll board space in its building in Rochester to the New York Telephone Company?

A. Yes, sir.

Q. Is that the only lease between the two companies, other than for wire facilities, and so on?

A. That is the only building lease that I know of.

Q. Does that lease contain any provision concerning this tandem equipment space?

A. No, it does not.

Q. Have you a separate written agreement for that, or is it a written lease or agreement?

A. Well, we lease the entire floor space that the New York Telephone Company requires in order to conduct its business, and then for the purpose of keeping the record straight, we lease back the relatively small amount of space required for this tandem equipment.

Q. Does the New York Telephone Company occupy more than the one floor?

A. Yes, they have an operator's rest room on a different floor. The space leased by them covers more than one floor.

Q. Would you mind furnishing a copy of that lease for the purpose of the record?

Mr. Nixon: I have no objection. That is a proper document.

The Witness: I would be glad to.

By Mr. McDowell:

Q. Mr. Boylan, the A. T. and T. and the New York Tele-
[fol. 311] phone Companies have a cable line from Rochester to New York, Albany and Cleveland, Ohio, haven't they?

A. Cable?

Q. Yes.

A. I am quite sure they have a toll cable coming into Rochester from the east and going out to points in the west, yes.

Q. Do you know what company owns the toll entrance cable between those cables of the A. T. and T. and the New York Telephone Companies and the toll board located in Rochester?

A. So far as we are concerned, the New York Telephone Company owns the cable.

Q. What do you mean by "so far as you are concerned"?

A. I mean if there is an ownership of the American Telephone and Telegraph Company that the New York Company acts as agent for the American Telephone and Telegraph Company in dealing with us. In other words, the New York Company is the point of contact with its own connecting company.

Q. You mean then that the Rochester Telephone Corporation does not own the toll entrance cable?

A. It does not.

Q. This toll entrance cable is located wholly within the territory of the Rochester Telephone Corporation, is it not?

A. From our eastern to our western boundary, yes, sir.

Q. Does the Rochester Telephone Corporation ever present to the New York Telephone Company for approval
[fol. 312] estimates of or for proposed construction?

A. No, sir.

Q. Never has?

A. Never has.

Q. Does the Rochester Telephone Corporation, or its representatives, ever present to the western division headquarters of the New York Telephone Company, located in Buffalo, New York, estimates for its information?

A. What kind of estimates? You mean concerning our company, our corporation?

Q. Construction work, anything of that kind, yes, or in any capacity.

A. The New York Telephone Company does not receive copies of estimates for the work of the Rochester Telephone Corporation.

Q. Well, then the Rochester Telephone Corporation or its representatives, have never at any time presented to the western division headquarters of the New York Telephone Company, located in Buffalo, estimates for the information of the New York Telephone Company?

A. Certainly not.

Q. Does the engineering department of the New York Telephone Company's western division ever assist the Rochester Corporation with its engineering or construction in any way?

A. At no time.

Q. It has never done so?

A. Never has done so.

Q. Referring to Commission's Exhibit B, which has been [fol. 313] called facilities agreements between the New York Telephone Company and the Rochester Telephone Corporation I will ask you have any of the provisions in this agreement, as set forth in appendix A thereof, ever been in any respect performed?

A. If you mean by that——

Q. Joint construction of cable, and so on.

A. Where do you find that in the exhibit?

Q. For instance, take Schedule 6, entitled "Cable facilities initially provided for the use of both parties." That provides, in substance, that whenever both parties require additional cable facilities, why they get together and build them, is that not true?

A. Yes, it provides that both parties, if they require joint facilities, that one of the parties shall furnish the facilities.

Q. Has any of that ever been done?

A. I could not answer that question. Our chief engineer is present.

Q. If it were done it would be necessary to consult with the engineering department, or some department of the New York Telephone Company, would it not?

A. In a pole line, for example, where they would jointly own half, or any part of it, certainly.

Q. But you do not know whether any of this has ever been done or not?

A. I do not know of any. I would suggest you ask our chief engineer that question.

Q. Mr. Boylan, in the articles of incorporation in evidence [fol. 314] here, identified as respondent's Exhibit No. 10, the Rochester Telephone Corporation territory is specifically limited to Monroe and Livingston Counties and certain named cities or towns in several other counties, is that not true?

A. I presume so. I haven't the articles of incorporation before me.

Q. Here it is (handing document to the witness).

A. Yes, it describes the various townships.

Mr. Nixon: May I have that question read by the reporter?

(The record was read by the reporter.)

Mr. Nixon: We do not want any erroneous impression here. That is not so. He just read it himself. If your Honor please, I submit the certificate of incorporation is the best evidence of the territory described therein.

Mr. McDowell: All right.

By Mr. McDowell:

Q. The territory to be occupied by the Rochester Telephone Corporation is certainly, specifically and definitely limited by the articles of incorporation, is it not?

Mr. Nixon: I object to that as incompetent, irrelevant and immaterial, not a proper statement of the law. The law of New York State is a corporation may operate any place within the state provided it is organized under the laws of the State of New York. A telephone company gets its power to occupy highways, streets and other places by virtue of a franchise granted by the particular localities through which it passes. A certificate of incorporation has [fol. 315] nothing to do with the places at which it may operate.

The Examiner: What is the question again.

(The question was read by the reporter.)

The Examiner: If he knows. I think there is something in what you say.

Mr. McDowell: I withdraw the question.

The Examiner: It is not the articles of incorporation that limit them, it is an agreement with the state as to where the Rochester Telephone Company would operate.

Mr. Nixon: Well, it will operate within the State of New York.

The Examiner: It could not operate in any place unless the state authorities authorized them to operate.

Mr. Nixon: The Public Service Commission.

The Examiner: That is right, the Public Service Commission.

Mr. Nixon: And the local municipalities concerned also.

By Mr. McDowell:

Q. Mr. Boylan, state if you know how the territorial limits of the Rochester Telephone Corporation are now fixed.

A. You see, as I stated——

Q. No, I asked you to state how it is fixed and determined.

A. It is determined, as I understand it, by filing an application with the Public Service Commission for permission and approval and a certificate of public convenience and necessity, in so far as our territorial boundary is concerned. We did make such an application and received an order [fol. 316] from the Commission following such application.

Q. Did the Rochester Telephone Corporation at any time have any agreement with the New York Telephone Company with reference to the territorial limits of the Rochester Telephone Corporation?

A. I do not know of such an agreement.

Q. Mr. Boylan, I want to get back for one more question on that tandem equipment. I asked you whether or not, with this tandem equipment for A-B calls, and the tandem from the Rochester toll board to the New York board, would not operating conditions be simpler than with the tandem equipment to the Main toll board for both extra territorial and A-B calls?

A. Are you speaking now of creating another toll board?

Q. No. If we had this tandem equipment that is used for A-B tolls, with your own toll lines in your own central office, and then run your toll lines to the New York Telephone Company's toll board, that is necessary for the extra territorial tolls, would not the operation be simpler?

A. No.

Q. For your company?

A. No, sir.

Q. Now, just one thing more. It is necessary for me to get back to this in view of the correction in the record that has been made. At the time you went with the Mountain Home Telephone Company who was president of it, do you know?

[fol. 317] A. It all depends on what you mean.

Q. Well, you were with the Mountain Home Telephone Company, Plattsburg, New York, in 1914, were you not?

A. Yes, sir.

Q. And from then on until you severed your connection there in 1921 and went with the Rochester Company?

A. Yes, sir.

Q. Who was president of the Mountain Home Company in 1914?

A. Irvin H. Griswold.

Q. He was president at the same time he was attorney for the New York Telephone Company, was he not?

A. No, sir.

Q. An officer of the New York Telephone Company?

A. No, sir.

Q. Who was vice president?

A. William B. Woodbury.

Q. Do you know whether or not he was connected with the New York Telephone Company at the same time?

A. He was.

Q. In what capacity?

A. Assistant to the president.

Q. Mr. Griswold was president of the Mountain Home Telephone Company during the years succeeding 1914 to 1921, was he not?

A. Yes, sir.

Q. And Mr. Woodbury was vice president?

A. I believe so.

Q. During all of that time you were general manager, is that true?

[fol. 318] A. Yes, sir.

Q. And from 1917 to 1921 you were also chief engineer?

A. I was chief engineer during the entire period that I was there.

Q. As well as general manager?

A. Yes, sir.

Q. And during the year 1915 you served as a director, is that not true?

A. I served for a comparatively short time. It may have been 1915.

Q. Were you on the executive committee of that Mountain Home Telephone Company?

A. No, sir.

Q. At no time?

A. I do not think so.

Q. Then if the annual report of that company for 1920 shows that you were on the executive committee at that time do you say there was a mistake made in that report?

A. In 1920?

Q. Yes.

A. Well, if I were not a director I do not see how I could be a member of the executive committee, because the executive committee is named—I might correct that by stating that the members of the executive committee are selected from the directors.

Q. Well, if the annual reports of the Mountain Home Telephone Company for 1915, 1916, 1917, 1918, 1919 and [fol. 319] 1920 state that you were a director of that company during each of those years, would you say there is a mistake in the reports?

A. I should seriously question that. My recollection is that I served as director only in between the vacancy caused by the death of one of the directors and until his successor was appointed.

Q. As a matter of fact you did serve right straight through to 1920?

A. I do not think so.

Q. Do you know whether you did or not? Are you sure?

A. I have given you my recollection of it.

The Examiner: Are there any more questions?

Mr. Nixon: Yes, sir.

The Examiner: Are we going into this other matter with this witness or with the next witness, the amendment to the order, the broadcasting provision?

Mr. Nixon: The next witness.

Mr. McDowell: That will be all with this witness.

Redirect examination.

By Mr. Nixon:

Q. Mr. Boylan, I direct your attention to page 153 of the record of the hearing held on January 8, 1936, and I call

your attention to the question which reads as follows: "How did you happen to come with the Rochester Corporation?" And your answer to that question, as it appears in the record (handing record to the witness). I now ask if you wish to make any different answer to that question than appears on page 153 of the record?

[fol. 320] A. Yes, I would like to correct the answer to "Through Mr. Fuller, who had made several trips to Plattsburg while negotiations for its consolidation were going on."

Q. By "its" do you mean the Mountain Home Telephone Company?

A. No, I mean the Rochester Company.

Q. The Rochester Telephone Corporation, is that correct?

A. Well, of course the Rochester Telephone Corporation had not come into being at that time.

Q. Then you mean by the new Rochester Company?

A. Yes.

Q. Now, are there some toll calls originating in the Rochester territory and destined to be terminated in the Rochester territory which can be completed without any act by the New York Telephone Company, or the use of any of the facilities of the New York Telephone Company?

A. There are.

Q. And in those cases of course the New York Telephone Company receives no part of the revenue for any of those messages, is that correct?

A. It does not.

Q. Are there some other toll calls originating in the Rochester territory and destined to be terminated in the Rochester territory which can only be completed with the aid of an operation by the New York Telephone Company?

A. There are.

Q. And that operation that I refer to is a switching operation?

[fol. 321] A. That is correct.

Q. Now, what amount is paid to the New York Telephone Company for that switching operation in connection with the messages which I have just described? Is that the operation where a charge of two and one-half cents per message is made in addition to a rental charge of $320.93 per month?

A. That is correct.

The Examiner: Excuse me just a minute.

By The Examiner:

Q. What do you mean by "switching operation"?

A. There are two kinds of toll calls, your Honor. One is where the operator receives the call from the subscriber, makes a ticket and sees to it that the subscriber is connected with the party he is talking with. She looks after all of that transaction from the beginning of the call to the termination of it. There is another service which she performs when an operator at a distant exchange asks her simply to connect her with another toll line.

Q. What I am trying to ask you is this: It is not just a matter of turning the switch like I turn that electric light switch, you have to have some wires and other services, do you not?

A. There are pairs of cords.

Q. The New York Telephone Company has facilities on the other side of that switch on which to carry its business from the Rochester Telephone Corporation's service, it is not just a matter of turning a switch on the switchboard, is it?

A. It is a matter of putting up a connection, which amounts to the same thing.

[fol. 322] Q. What is on the other side of the connection? It is wires, isn't it?

A. That is correct.

Q. Those wires belong to the New York Telephone Company. That is what you mean by "switching" is it not? You mean switching from the Rochester Telephone Corporation service to the New York Telephone Company service?

A. As I understood Mr. Nixon's question, he was speaking about a call made over a toll line owned by the Rochester Telephone Corporation and to another toll line owned by the Rochester Telephone Corporation.

Mr. Nixon: That is right.

The Witness: Which is necessary to go through the Rochester toll board in order to make the connection.

Mr. Nixon: Your Honor, the question that I asked was just as clear as I could possibly make it. I read it.

The Examiner: The question is very clear. Then the witness uses some terms which I misunderstand, and somebody else might misunderstand. Your question was all right, and his answer was all right, but when he says

"switching" I want to know what you mean by "switching."

Mr. Nixon: That is right. Your question is: What is that switching operation?

The Examiner: Yes.

Mr. Nixon: Then you said it comes over lines of the New York Telephone Company.

The Examiner: I asked whether it does or not.

Mr. Nixon: All right, ask him that question. He started [fol. 323] to say that case I was assuming was a message originating in the Rochester territory and ending in the Rochester territory, but switched over the New York Telephone switchboard. That is what I am talking about.

The Examiner: Does switching over the New York Telephone switchboard mean anything else than what transpires in one room, or does it mean something that transpires outside of that room?

Mr. Nixon: That I do not know.

The Examiner: I am asking the question.

The Witness: Well, we will assume, your Honor, that a call originates in Webster, New York, which is north of Rochester, and is completed in another exchange owned by us, which is Scottsville south of Rochester.

By Mr. Nixon:

Q. Both places being in the Rochester territory, is that right?

A. That is right.

Q. That is what the Commissioner is interested in. All right.

A. And the lines coming into Rochester and going out of Rochester are owned by the Rochester Telephone Corporation.

By The Examiner:

Q. The lines on both sides of the switchboard are owned by the Rochester Telephone Corporation?

A. That is correct.

Q. Then why does the New York Telephone Company have to do the switching?

A. For the reason that it is to the advantage of both [fol. 324] companies to have a consolidated toll switchboard and not have two switchboards for toll purposes. Now, if the Webster operator rings into the New York toll board

and says, "I want Scottsville" she answers Webster with one plug of a pair of cords and she connects the other plug to Scottsville. In other words, she connects the Webster line with the Scottsville line, and that is all the service she performs.

Q. Then all of the lines known to laymen as wires running in and out of that switchboard belong to the Rochester Telephone Corporation?.

A. No, sir.

By Mr. Nixon:

Q. But in the case——

The Examiner: Now, wait a minute. Let him finish his answer.

Mr. Nixon: I want it straight the same as you do.

By The Examiner:

Q. Which of those lines running into that switchboard belong to the New York Telephone Company?.

A. The lines coming in from all directions and crossing the territorial boundary of the Rochester Telephone Corporation.

Q. Are any of those lines of the New York Telephone Company used to handle toll messages within the territory of the Rochester Telephone Corporation?

A. No, sir.

Q. Messages which are received by the Rochester Telephone Corporation on its system and are delivered or terminated on the facilities of the Rochester Telephone Corporation?

[fol. 325] A. No, sir.

Q. Not a one?

A. I cannot recall any.

By Mr. Nixon:

Q. Would it not be better, for the purposes of us laymen, to describe the switching operation that I have asked you about as a bridging operation, bridging the two circuits of the telephone company on either side of the switchboard together? Is that a fair layman's statement of it?

A. Well——

Q. Let us forget it. I will withdraw the question.

A. I think we are all familiar with what a plug and jack is, because they are used on our radio sets a great deal. I might say all of the toll lines, whether they are owned by the New York Telephone Company or the Rochester Telephone Corporation terminate on the New York Telephone Company's toll board on jacks. In front of the toll operators are pairs of cords which are connected with a plug at each end, and all that is necessary for the operator to connect one toll line to another is to insert the plug of a pair of cords in one line and the plug on the other end of the cord in another line, and in that way she will switch or connect them together.

By The Examiner:

Q. Then, sir, the relationship between the Rochester Telephone Corporation and the New York Telephone Company is not solely through physical connection, but it is in addition to that through operation by agents of the New York [fol. 326] Telephone Company?

A. Who perform certain work for us, yes, sir.

The Examiner: Who perform certain work for the Rochester Telephone Corporation. All right.

By Mr. Nixon:

Q. That connection is accomplished, you mean, by operators, by human beings doing certain things to make a physical connection between the facilities of the New York Telephone Company and those of the Rochester Telephone Corporation?

The Examiner: Now, wait a minute.

Mr. Nixon: I submit that is a fair question.

The Examiner: That is not a question at all. That is a leading statement made by counsel in an effort, the Examiner thinks, to amplify the witness's answer so that it appears very differently than what he stated.

Mr. Nixon: Counsel thinks that the Examiner's question was a self-serving declaration and assumed the whole issue in this lawsuit.

The Examiner: A self-serving declaration on whose part?

Mr. Nixon: On the part of the Examiner, if you please. If the Examiner is a party to the proceeding—and I do not

know that he is—it seems to me your Honor's question assumed the whole issue in this controversy, and the witness has not been permitted fully to answer, and my question was certainly not intended to make a speech or put anything in the witness's mind. I want him to answer the question and I want him to understand it before he answers [fol. 327] it. I do not want him to be answering questions that are not understood by him.

The Examiner: I do not want to encumber the record with remarks of the Examiner as well as the counsel for the respondent, but I think we have a most intelligent witness here, a man who certainly commands a tremendous salary and occupies the most responsible position. He raised no objection to the question, and the insinuation of counsel that any question that the Examiner has asked or might ask would be self-serving is certainly insinuating something that I think is highly improper.

Mr. Nixon: If it is I apologize for it.

The Examiner: No apology is needed. I want the record to show it. I think it is improper. I have no desire to serve anybody other than in accordance with my oath as an Examiner. I am trying to find out from this witness, who I think is — a position to tell us, just what the relationship is between the New York Telephone Company and the Rochester Telephone Corporation, and my question elicited an answer which still stands, unless the witness desires to further explain it, and it cannot include any explanation by counsel.

Mr. Nixon: May I have my question read?

The Examiner: Your question?

Mr. Nixon: Yes. To which your Honor objected.

The Examiner: If you want to ask a question you should change the form of the question.

Mr. Nixon: I cannot ask it any differently than I have, and I do not think it is leading. I do not think it is im- [fol. 328] proper. I would like to have it read again, because I cannot frame it any better than I did then.

The Examiner: I would suggest, however, instead of doing that, that you re-read my question and re-read the witness's answer to my question, and then ask him if he desires in any way to amplify that question.

Mr. Nixon: I will do that willingly, but may I not, at some stage, have my own question read before we get too far away from it? I have no objection to the witness leaving

the room while it is read if you think it is intended to give him some information that he hasn't got. That is not my point at all. I want the matter to appear clearly on the record.

Will you read the Commissioner's question and the answer?

(The question was read by the reporter as follows:

"The relationship between the Rochester Telephone Corporation and the New York Telephone Company is not solely through physical connection but it is, in addition to that, through operation by agents of the New York Telephone Company?

"A. Who perform certain work for us, yes, sir.")

The Examiner: Do you want to add anything to that?

The Witness: I do not quite understand what you mean by "physical connection." There are two questions.

By The Examiner:

Q. You say, sir, you do not understand what the Examiner means by "physical connection between the two companies"?

A. Yes, sir.

[fol. 329] Q. Did you take any part in the preparation of the questionnaire that was furnished to the Commission by the Rochester Telephone Corporation?

A. Yes, sir.

The Examiner: Where is that quest' 'naire? Have you got a copy of it there?

Mr. McDowell: I have the original here.

By The Examiner:

Q. In answer to Question 5 of the questionnaire submitted by the Communications Commission to the respondent corporation, "this corporation owns and maintains its own switchboards at all points at which it operates, except that at Rochester the toll board is owned and operated by the New York Telephone Company. All local exchange traffic is handled by this corporation."

What do you mean when you say "this corporation"? What corporation is that? The New York Telephone Company?

A. No.

Q. The Rochester Telephone Corporation?

A. The Rochester Telephone Corporation.

Q. "This corporation" that is the Rochester Telephone Corporation?

A. Yes.

Q. "This corporation likewise handles all toll traffic originating and terminating within its own territory, with the exception of certain toll traffic originating at Rochester, which is handled by the New York Telephone Company." Is that a correct statement?

A. Yes, sir.

[fol. 330] Q. Then the Rochester Telephone Corporation handles its own toll calls throughout?

A. With the exception, as I stated here, of certain toll traffic originating at Rochester.

Q. Now if the toll traffic did not originate at Rochester who handles it then?

A. Well, that depends on where it originates and where it goes to.

Q. Then some of that that originates other than at Rochester is handled by the New York Telephone Company?

A. All of the traffic originating in Rochester for toll calls is handled by the New York Telephone Company at its toll switchboard.

Q. Now, when you say "is handled by the New York Telephone Company," what do you mean?

A. I mean it is switched.

Q. It is just switched?

A. Switched.

Q. And that switching is done by the employees of the New York Telephone Company?

A. Telephone operators employed by the New York Telephone Company.

Q. It is switched by employees of the New York Telephone Company, regardless of whether or not it is interstate or intrastate?

A. Regardless.

Q. So that at that point the New York Telephone Company handles your interstate business as well as intrastate business?

[fol. 331] A. Yes, sir.

Q. Now, what do you call the connection at that point between the Rochester Telephone Corporation and the New York Telephone Company? Is that a physical connection?

A. The making of the connection is commonly referred to as switching.

Q. That is, is it not, a physical connection between the two companies?

A. I would say it was, yes, sir.

Q. So you do know now what a physical connection is?

A. In the sense that you have described it I understand what you mean, yes.

The Examiner: Now, then, will you read the witness the question I asked that he did not understand because of the use of that term?

(The question was read by the reporter as follows:

"The relationship between the Rochester Telephone Corporation and the New York Telephone Company is not solely through physical connection, but it is in addition to that through operation by agents of the New York Telephone Company?")

The Witness: I have answered the first part of that question. The second part I would say "no." The first part covers the entire question, I believe.

By The Examiner:

Q. The point I am trying to make clear is this: Do you use employees of the New York Telephone Company to do business for the Rochester Telephone Corporation, which is other than the handling of business by the New York Telephone Company which is interstate business?

A. If you mean by "agents" the New York Telephone [fol. 332] Company's operators who switch calls——

Q. Yes.

A. —I will say "yes."

The Examiner: Now, sir, do you want your question read?

Mr. Nixon: I will tell you frankly I cannot recall it. I would like to have it read if for no other reason than to refresh my recollection.

(The question was read by the reporter as follows:

"That connection is accomplished, you mean, by operators, by human beings doing certain things to make a physical connection between the facilities of the New York Telephone Company and those of the Rochester Telephone Corporation?")

Mr. Nixon: I would like to insist upon that question being answered.

The Examiner: All right, go ahead.

By Mr. Nixon:

Q. Will you answer that, Mr. Boylan?

A. I would say "yes."

Q. Now, this morning you testified that 868,000 toll calls originated in the Rochester Telephone Corporation's territory, is that correct?

A. That is correct.

Q. And you were asked several questions about which of those telephone calls the New York Telephone Company had anything to do with, is that correct?

A. That is correct.

Q. Now, during the noon adjournment have you attempted to check the situation with regard to those 868,000 toll calls? Yes or no.

[fol. 333] A. Yes.

Q. And what are you able to tell us with regard to any or all of the 868,000 telephone calls, toll calls, with special reference to what the New York Telephone Company did, if anything, in regard to those calls?

A. I believe the question was as to the termination of those calls. In other words, where did they go? I was unable to get the information, because no record is kept of them, except at times when a detailed study is made of the traffic. That usually happens every four or five years, and I would have to go back to one of those studies in order to give an approximate answer.

Q. You stated this morning that 221,000 of those calls in 1935 were handled by the Rochester Telephone Corporation in the entirety. Am I correct about that?

A. Yes, they were handled by the Rochester Telephone Corporation operators.

Q. Without any assistance from the operators of the New York Telephone Company?

A. Yes, sir.

Q. Now of the balance of the 600,000-odd——

A. Pardon me. There may be some calls—I will answer "yes."

Q. Of the balance of 600,000-odd calls is it true that some of those might have been calls which actually terminated in the Rochester Telephone Corporation's territory?

A. I do not think so.

The Examiner: You talk about self-serving questions—go [fol. 334] ahead. Answer the question.

Mr. Nixon: Would you like to have me reframe it?

The Examiner: Go ahead.

The Witness: Read the question please.

(The question was read by the reporter.)

The Witness: I have no idea where they terminated.

By Mr. Nixon:

Q. Is it possible that some of them terminated in the Rochester territory?

Mr. McDowell: That is objected to, as to the possibility.

The Examiner: Let us be liberal.

The Witness: I could not say.

By Mr. Nixon:

Q. At the hearing of December 8, 1936 you were asked some questions about control of the Mountain Home Telephone Company at the time you were managing that company. Do you recall those questions?

A. The Mountain Home Company? Yes, I do.

Q. What is the fact as to whether or not the Mountain Home Telephone Company was controlled by the Bell Telephone Company at the time you were general manager of the Mountain Home Telephone Company?

The Examiner: I think he already testified to that, that it was.

A. No, I testified that I was not sure, your Honor, but I have brushed up a little on that question and I now recall that the New York Company and the various independent companies took bonds in the new company for their prop- [fol. 335] erties on the basis of the value of the property as appraised, and in a common stock issue the stock was issued on the basis of previous revenues of the various independent companies and the New York Telephone Company. I remember that the proportion, in so far as the ownership of the property was concerned, ran about 60 and 40 per cent, that is 60 per cent New York Company, as nearly as I can recollect it, and 40 per cent independent. I also remember that the same ratio held true in so far as revenues were concerned, except that the independent companies had the

greater revenue. So that it must be in the early days, at least, of the Mountain Home Company that the stock control did not rest with the New York Telephone Company. I am quite sure that later, I do not know how long afterwards, certain individuals who held the stock in Northern New York, through circumstance were obliged to sell it and it possibly found its way into the hands of the New York Telephone Company. So that sometime, probably a year or two before I left, maybe previous to that, the actual control of stock was in the hands of the New York Telephone Company.

By the Examiner:

Q. Did the New York Telephone Company, as a matter of fact, control it even before they got the stock control?
A. No, sir.
Q. They did not?
A. No, sir.

By Mr. Nixon:

Q. Have you ever observed any of the so-called Bell directors of the Rochester Telephone Corporation in the City [fol. 336] of Rochester on any day or at any time other than the dates of the directors meetings of the Rochester Telephone Corporation?

The Examiner: I want to be very liberal to you, if you think that is important.

Mr. Nixon: I do not want to tell him what the answer is going to be, but I think, if you let him answer, you will find out it will be important.

The Examiner: He knows what the answer is.

By Mr. Nixon:

Q. What is the answer?
A. I do not recall any Bell official coming to Rochester, except to attend the meetings of the board of directors.

By the Examiner:

Q. You would not say that they were there, though, would you, because you did not see them?
A. No. If they kept out of sight I would not see them.

Mr. Nixon: If they were going to control the men I should think they would have to see them.

By Mr. Nixon:

Q. Have you seen Bell directors in the City of Rochester on dates other than the dates of the regular meetings of the board of directors of the Rochester Telephone Corporation, in your own experience as president or vice president of the Rochester Telephone Corporation?

A. Yes, I think on three occasions.

Q. Do you recall what they were?

[fol. 337] A. They were to attend the funeral of three of our officers who had died at different times.

Q. On each occasion it was the funeral of some officer or director of the Rochester Telephone Corporation?

A. Yes, sir. I do not remember at any other time that I have seen them in Rochester.

Q. Will you state whether or not you know whether the New York Telephone Company owns any bonds of the Rochester Telephone Corporation?

A. I, of my own knowledge, have no information on that subject, but I did make an effort to find out whether it was so.

Mr. Nixon: Will you permit him to state what his investigation discovered, your Honor?

The Examiner: It seems to me it would be hearsay, would it not?

Mr. Nixon: We have got a letter at the hotel, if we have chance to look for it, stating that they do not own any, we have a letter from some officer of the New York Telephone Company.

The Examiner: You haven't brought any of those officers here, have you?

Mr. Nixon: We haven't had a chance to bring that letter here from the officer.

The Examiner: You haven't brought any officials of the New York Telephone Company here to testify, have you?

Mr. Nixon: No, sir. I think we have a letter from some official stating that the New York Telephone Company owns no bonds of the Rochester Telephone Corporation.

[fol. 338] The Examiner: That statement has no part in the record.

Mr. Nixon: If you will permit me, I will back it up by the letter.

The Examiner: I do not think the letter would be competent testimony.

Mr. Nixon: Certainly my testimony is not competent. That is all, Mr. Boylan.

Recross-examination.

By Mr. McDowell:

Q. Mr. Boylan, did you know a man by the name of Frank J. Brookman who was employed as auditor for the Mountain Home Telephone Company?

A. Yes, sir.

Q. I hand you the annual report of the Mountain Home Telephone Company to the Interstate Commerce Commission of the United States for the year ended December 31, 1915. Directing your attention to page 109 thereof, which I ask to be marked Government's Exhibit C.

(The document referred to was marked "Government's Exhibit C, Docket No. 3293," for identification.)

By Mr. McDowell:

Q. (Continuing.) This annual report is signed, sworn to and submitted by whom, Mr. Boylan?

A. Irvin H. Griswold, Frank J. Brookman, and a supplemental oath by the president, Irvin H. Griswold, verification by the auditor, Frank J. Brookman.

Q. Directing your attention to Government's Exhibit C, page 109 thereof, Item 109, entitled "Voting powers and [fol. 339] election," can you tell me from that how many shares of common voting stock were issued by the Mountain Home Telephone Company?

Mr. Nixon: Issued by the Mountain Home Telephone Company?

Mr. McDowell: Yes.

The Examiner: How many shares were what?

Mr. McDowell: Issued and outstanding by the Mountain Home Telephone Company.

The Examiner: I do not see how this is material.

Mr. Nixon: I was going to object to that on that ground.

Mr. McDowell: He has testified about control.

Mr. Nixon: I object to it as being incompetent, irrelevant and immaterial and too remote, and furthermore as having no binding effect on anybody on the subject of control of the Rochester Telephone Corporation.

The Examiner: I do not know what the purpose was of counsel for the respondent in asking the questions that he did, but he did ask them. You asked those questions just a few moments ago.

Mr. Nixon: That was all brought out on the other hearing on cross-examination. The witness was mistaken and I gave him the opportunity to change it.

The Examiner: He is showing this to the witness and after reading it the witness might change his testimony, after refreshing his recollection.

Mr. Nixon: All right.

Mr. McDowell: That is the purpose of it.

By Mr. McDowell:

[fol. 340] Q. I will ask the question as to whether or not this discloses that there were 6,792 shares of voting stock?

A. That is correct.

Q. And it also shows, does it not, that the New York Telephone Company held 6,093 of that total of 6,792?

A. That is correct.

The Examiner: In view of the witness refreshing his recollection I will ask him whether he desires to change his testimony which was given in answer to questions of counsel for the respondent?

The Witness: Your Honor, I testified that at the time I went with the company——

Mr. McDowell (interrupting): Now, just a minute.

Mr. Nixon: Let him finish his answer. Wait a minute.

The Examiner: Let him answer, then you can make a statement. Go ahead.

The Witness: At the time I went with the company I was quite sure that the control did not rest with the New York Company. Subsequent to that I was not so sure. I do not know when it was effected or when it took place.

By The Examiner:

Q. Why is it that you were not sure?

A. For the reason that the combined revenues of the independent companies were greater than those of the New

York Telephone Company, and for the reason that the stock was issued in proportion to the revenues of each group.

Q. That is what you understood?

A. Yes, sir.

The Examiner: Now, counsel for the Commission wants to make an observation.

[fol. 341] Mr. McDowell: I am prepared, with the record here, with successive reports through 1920, to show that all through the years including 1920, as the last 1920 report will show, that that stock ownership remained the same. If you desire I will identify each one separately and offer it in evidence, for the benefit of the witness.

Mr. Nixon: I will assume he is prepared to prove what he says he can prove, but I object to it on the ground it is incompetent, irrelevant and immaterial, and not binding on us. We assume no responsibility for the truth of those reports, because we do not know anything about them. I further object on the ground it has nothing to do with the issue now before us, which is the present control of the Rochester Telephone Corporation.

The Examiner: I think the record discloses the situation satisfactorily.

By Mr. McDowell:

Q. Now, directing your attention to page 103 of the same annual report, Item 102,—which I ask to be marked Government's Exhibit D——

(The document referred to was marked "Government's Exhibit D, 'Docket No. 3293,'" for identification.)

The Examiner: Any objection?

Mr. Nixon: The same objection. It is not binding on us.

By Mr. McDowell:

Q. (Continuing.) —directing your attention to Item 102, entitled "Directors," I ask you if you see the name of John [fol. 342] P. Boylan there?

A. Yes, sir, I do.

Q. And for what term was this John P. Boylan director of this company, as disclosed by this report?

A. From February 5, 1915 to February 11, 1916.

Q. Is this John P. Boylan named in this annual report to the Interstate Commerce Commission the same John P.

Boylan who is now the witness here, in other words, yourself?

A. Yes.

Q. Then you were director from February 5, 1915 to February 11, 1916, is that correct?

A. That is correct.

By The Examiner:

Q. And after seeing this you desire to change your previous testimony?

A. Why, it made very little impression upon me, your Honor.

Q. What made little impression on you?

A. The fact I was a director in Northern New York. I do not remember being a director.

Q. That is not the question.

A. I desire to change my testimony, yes.

Q. You desire to change your testimony in accordance now with what these reports show?

A. Yes, sir.

Mr. McDowell: If the Examiner please, I have here the annual reports of the Mountain Home Telephone Company to the Interstate Commerce Commission of the United States for each of the years 1915 to 1920, inclusive, and on page [fol. 343] 103 of each one of these reports it discloses that John P. Boylan was a director of the Mountain Home Telephone Company. Now, I would be glad for the witness and the counsel to examine them.

The Examiner: I understand, in view of that fact, the witness desires to change his testimony as to the fact that he was not a director to the fact that he was a director during those periods of years, is that right?

The Witness: That is correct, your Honor. If I thought it was important perhaps I would have looked it up.

By Mr. McDowell:

Q. How were the directors elected?

A. Elected by the stockholders, I presume.

Q. Each year, were they not?

A. Each year, yes, sir.

Q. At the time of the election of directors each director was notified of his having been elected, is that true?

A. That is usually what happens.

Q. And he receives notices of directors' meetings?
A. That is true.

By The Examiner:

Q. Do you own any stock in that company?
A. Yes, sir.
Q. Did you purchase it yourself or was it furnished you by somebody else?
A. I bought it for cash.
Q. How much stock did you own?
A. Not over 50 or 75 shares.
[fol. 344] Q. Did you dispose of it prior to your leaving the company?
A. I believe so.
Q. Who purchased it?
A. I think it was purchased by the First National Bank or one of its clients.

Mr. Nixon: The First National Bank of what?
The Witness: Plattsburg.

By Mr. McDowell:

Q. Now, I hand you here the annual report of the Mountain Home Telephone Company, Plattsburg, New York, to the Interstate Commerce Commission of the United States for the year ended December 31, 1920, and direct your attention to page 102 thereof, which I ask be marked——

The Examiner: What does it show?
Mr. McDowell: It shows that J. P. Boylan was a member of the executive committee of the Mountain Home Telephone Company and that I. H. Griswold was another member, and chairman, and W. B. Woodbury was the other member of the executive committee.
The Examiner: Without introducing this record, does counsel for the respondent admit that this record so shows?
Mr. Nixon: I will concede the document to which Government counsel has called attention shows the facts stated in counsel's question.
The Examiner: Does the witness desire to change his previous testimony that he was not a member of the executive committee of this company? Do you desire to change your testimony?

[fol. 345] The Witness: Did counsel ask me that question, as to whether I was a member of the executive committee?

Mr. Nixon: He did on your cross-examination, yes.

The Examiner: And you said you were not, as I remember it.

Mr. McDowell: The witness said he was not, because he would have to be a director to be a member of the executive committee.

Mr. Nixon: That is right.

The Witness: Yes. I will admit, from the record here, that I was a member of the executive committee during the last year I was with the Mountain Home Telephone Company. I do not know how long it was.

The Examiner: Are there any further questions?

Mr. McDowell: No further questions.

The Examiner: Any further questions?

Mr. Nixon: Nothing further.

The Examiner: This witness is going to remain, is he not?

Mr. Nixon: Yes, sir.

The Examiner: Next witness please.

MOTION TO STRIKE

Mr. Nixon: Your Honor, perhaps this is the appropriate time to make a motion, and that motion is to strike out the testimony with reference to TWX service, on the ground that the orders under which this hearing is being held do not embrace any inquiry on that subject, and that the questions which have been asked on that subject are wholly irrelevant and immaterial on this particular question.

The Examiner: What is the basis of your statement that [fol. 346] this hearing does not involve any questions on TWX service?

Mr. Nixon: The basis for that objection, your Honor, is that the first order specifies that the hearing shall be on the question of control, depending on Section 2 (b) (2) of the Communications Act of 1934, and by an amendment of that order the order recites that the inquiry will be extended to cover the relationship between the Rochester Telephone Corporation and any local radio broadcasting station, but in neither case is the TWX service mentioned.

Furthermore, it seems to me that that inquiry might properly be made of a telegraph company rather than a telephone company.

The Examiner: The relationship between the New York Telephone Company and the Rochester Telephone Corporation in regard to any contracts that they might have between them in the handling of TWX service, it seems to me, is pertinent, as is any other relationship existing between those two companies, in order that the Commission might have before it all evidence of any transactions between those two companies for the consideration of the Commission, as to whether or not the Section 2 (b)(2) exempted the respondent from compliance with the orders of the Commission, as the respondent now claims and has claimed in its pleadings, so that the motion of the counsel for respondent is denied and exception is granted.

Mr. McDowell: I would like to ask the witness one or two more questions.

The Examiner: He is here. We can call him back. He will be on the stand again. I want to ask him some ques-
[fol. 347] tions too.

Whereupon JOHN W. MORRISON, a witness called on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Nixon:

Q. Your name is John W. Morrison?

A. Yes, sir.

Q. Mr. Morrison, where do you reside?

A. In Rochester, New York.

Q. And how long have you resided in that city?

A. I have lived in Rochester since 1906.

Q. Are you connected with the Rochester Telephone Corporation?

A. Yes, I am.

Q. And in what capacity?

A. As vice president, chief engineer.

Q. And how long have you been connected with the Rochester Telephone Corporation?

A. Since 1921, when the Rochester Telephone Corporation acquired the properties of the Rochester Telephone Company.

Q. Prior to that date did you have some connection with the Rochester Telephone Company?

A. Yes.

Q. What connection was that?

A. I was connected with the Rochester Telephone Company from 1906 to 1921 as the engineer.

[fol. 348] Q. And prior to 1906 what was your telephone experience or connection, if any?

A. I was associated with the Kinloch Telephone Company, the Kinloch Long Distance Telephone Company of St. Louis, Missouri.

Q. Was the Kinloch Telephone Company an independent telephone company?

A. Yes, it was.

Mr. Nixon: Now, if your Honor please, I offer this witness on the question of the broadcasting facilities furnished by the Rochester Telephone Corporation to two local radio broadcasting stations.

By Mr. Nixon:

Q. How many commercial radio broadcasting stations are there in Rochester, New York, if you know?

A. There are two stations in Rochester.

Q. What are the call letters of those stations?

A. WHAM and WHEC.

Q. Does the Rochester Telephone Corporation operate either of those stations?

A. It does not.

Q. Does the Rochester Telephone Corporation have any financial interest in either of those stations, such as the ownership of stock in them, or the holding of any obligations of either of them?

A. It does not.

Q. Do you know who owns and operates those stations?

A. WHEC is owned and operated by WHEC, Incorporated. WHAM is owned and operated by the Stromberg-

[fol. 349] Carlson Telephone Manufacturing Company.

Q. And is Station WHEC said to be operated by the Gannett Newspapers?

A. Yes, it is.

Q. Does the Rochester Telephone Corporation lease wire facilities to either or both of those broadcasting stations?

A. Yes, it leases wires to both of these stations.

Q. Will you please describe the facilities so furnished?

A. It leases three pairs of wires to Station WHEC connecting the studio with the transmitter. It happens that the studio and transmitter are separated about a mile and both are located within the city limits of Rochester, in the downtown section.

Q. In the case of Station WHAM, what are the facilities leased that you have reference to?

A. The Rochester Telephone Corporation leases three pairs of wires to Station WHAM connecting the studio with the transmitter. In the case of WHAM the studio is located near the center of the city, and the transmitter is located near Victor, New York, about 17 miles distant.

Q. Is the studio of WHAM in the Sagamore Hotel at Rochester, New York?

A. It is located at the Sagamore Hotel, 111 East Ave.

Q. Is there some technical name for the wires so leased?

A. Yes, we call a pair of wires a circuit.

Q. Does the Rochester Telephone Corporation lease more [fol. 350] than one of these circuits to either of these radio stations?

A. It leases three circuits to both of these stations.

Q. Three to each?

A. Three to each.

Q. And I understand that the three circuits in each case run from the studio station to the transmitter?

A. That is correct.

Q. Do any of these circuits go through the switchboard of the Rochester Telephone Corporation?

A. None of these circuits go through th switchboard of the Rochester Telephone Corporation.

Q. Does the Rochester Telephone Corporation furnish any electrical energy for the transmission of material over any of these circuits?

A. It does not.

Q. Does the Rochester Telephone Corporation ever make any use of these circuits?

A. It does not.

Q. Does the Rochester Telephone Corporation furnish any battery or energy, or any other means of connecting those circuits to its telephone system?

A. It does not.

Q. These are merely a pair of wires between the studio and transmitter, is that correct?

A. That is correct.

Q. Is it proper to characterize them as dead wires as distinguished from live wires?

A. They are dead wires.

[fol. 351] Q. What is the rate charged for these wires?

A. The rate is $4 per mile per month.

Q. Now, are the circuits which you have just described the only facilities furnished by the Rochester Telephone Corporation to either Station WHAM or WHEC?

A. They are the only facilities, except conductors, the circuits located at various places about the city and which terminate in the studios of the two stations.

Q. Are these facilities which you are now about to describe known as spot locations?

A. They are.

Q. And does the Rochester Telephone Corporation lease to either Station WHEC or WHAM facilities for what you call spot locations?

A. It does.

Q. And how many of those spot locations are there in the City of Rochester in which the lease is made with WHEC?

A. In the case of WHEC there are eleven locations.

Q. And how many in the case of WHAM?

A. In the case of WHAM there are 15 locations.

Q. Just tell us generally the character of these so-called spot locations?

A. These circuits terminate at locations such as Convention Hall, prominent restaurants, hotels, Chamber of Commerce, some of the schools, and extend from these main places to the studios of the broadcasting stations.

Q. Are there some of those spot locations where the facilities are furnished both to WHAM and to WHEC?

A. Some of the locations are identical.

[fol. 352] Q. Do I understand that in each case the facilities furnished run from the spot locations either to Station WHEC's studio or to Station WHAM's studio?

A. That is correct. The wires extend from the spot location direct to the studios.

Q. And will you describe what those facilities consist of, that is, from the spot location to the studio?

A. They consist in each case of two pairs of wires extending from the spot location to the studio.

Q. Does the Rochester Telephone Corporation furnish any electrical energy for the transmission of material over those circuits?

A. It does not.

Q. Do any of those circuits go through the switchboard of the Rochester Telephone Corporation?

A. No, they do not.

Q. Is the situation with respect to circuits leased for spot locations identical for the situation where the circuits are leased from studio to the transmitter?

A. They are identical.

Q. In the sense that they are dead wires, without energy?

A. Yes.

Q. What is the rate charged for the circuits furnished from the spot locations to the studio?

A. The rate is $4 per month per mile.

The Examiner: Per circuit?

The Witness: Per pair, yes, sir.

By Mr. Nixon:

[fol. 353] Q. Does the Rochester Telephone Corporation lease or furnish any other facilities to either of these broadcasting stations besides those which you have now described?

A. No, it does not.

Q. Then the only connection that the Rochester Telephone Corporation has with these broadcasting stations is the leasing of the circuits that you have described?

A. That is correct.

Q. The Rochester Telephone Corporation furnishes no energy for the transmission of material over any of those circuits?

A. That is correct.

Q. None of those circuits pass through the switchboard of the Rochester Telephone Corporation?

A. That is also correct.

Q. And the Rochester Telephone Corporation furnishes no services in connection with the circuits which you have described, am I correct in that?

A. You are.

Mr. Nixon: That is all.

Cross-examination.

By Mr. McDowell:

Q. I understand you to say that all that the Rochester Telephone Corporation does is just to furnish these so-called dead wires to the broadcasting company?

A. That is correct.

Q. They have a lease for that?

A. You refer to a contract lease?

Q. Yes.

A. Yes, they have a lease.

[fol. 354] Q. Have you a copy of it?

A. Yes.

Q. Of this contract or lease?

A. Yes. Do you wish to have it?

Q. I would like it to be furnished for the record, please.

(The witness produced a document.)

The Witness: I haven't the formal contracts executed, no if that is what you want.

Mr. Nixon: Are there any formal contracts executed between these stations and the Rochester Telephone Corporation?

The Witness: For what?

By Mr. McDowell:

Q. For the lease of the circuits.

A. All of these circuits?

Mr. Nixon: That you have described.

By Mr. McDowell:

Q. Well, you described circuits that you say are leased. You say there are three circuits leased to WHEC?

The Examiner: Never mind what he says. Ask him whether he has got the contracts for that service.

By Mr. McDowell:

Q. They are leased to them, are they not?

A. They are leased to them, yes. Whether there are formal contracts or not I do not know.

Q. You stated that you had contracts or leases.

A. I stated we had a form of contract, which I offered. Whether we have formal contracts executed or not I do not know.

[fol. 355] The Examiner: Does counsel for the respondent know whether they have contracts or leases, and will he furnish them?

Mr. Nixon: I will, if they are in existence. I was told that these services were furnished on an application card like telephone service at the schedule rate of $4 per mile per month. Is that correct?

The Witness: That is correct.

Mr. Nixon: I never have seen a formal contract. I never have seen one like the one now in my hand. If there is one I will produce it.

By Mr. McDowell:

Q. If that is so, if they are provided on application in the form submitted by a subscriber for telephone service, providing that he has to pay $4 per month per mile for it, then that is not a lease, is it?

A. I am not capable of determining what is a lease or what is a contract.

Q. Well, it would be the same as a subscriber getting any telephone, would it not?

A. I do not know.

Q. Why do you say that they lease them these circuits then?

A. Because I know that they use them, and I assume that they lease them. Perhaps a better term would be that the Rochester Telephone Company rents them.

Q. Do you know which they do or how it is done? Yes or no.

A. Do what?

[fol. 356] Q. Furnish these lines.

A. They do furnish these lines.

Q. Do you know how they furnish them?

A. Whether it is a lease, contract or rental?

Q. Yes.

A. From a legal viewpoint, I do not.

Q. Do you know what spot locations are provided with wires by the Rochester Telephone Corporation?

A. Yes, sir.

Q. Name them.

The Examiner: He has testified to that.

Mr. McDowell: He has named them, he has named all of them?

The Examiner: Yes, sure, he named them all here. He said eleven spot locations in one case and 15 spot locations in another case. Fifteen in the case of WHAM and 11 in the case of WHEC.

Mr. McDowell: He did not say who they were. I asked him if he knows.

The Witness: You do ask that?

Mr. McDowell: Yes.

The Examiner: Have you got a list of the spot locations?

The Witness: Yes, I have a list of them.

By Mr. McDowell:

Q. Furnish that list, please.

A. I cannot furnish it. I will read it.

Q. Will you furnish a copy of it for the record?

A. I will be very glad to.

Mr. Nixon: It is a simple thing for him to read it off into [fol. 357] the record.

The Examiner: Read those off for Station WHEC.

The Witness: Odenbach Restaurant.

Mr. Nixon: What station is this now?

The Witness: These are circuits furnished Broadcast Station WHEC. Odenbach Restaurant, No. 14 South Avenue, Rochester, New York.

Palace Theatre, 71 Clinton Avenue, North.

The Examiner: Do you want the addresses?

Mr. McDowell: No.

The Examiner: Let us have the names without the addresses. We know they are all in Rochester, New York.

The Witness: Rochester Times Union, Rochester Democrat Chronicle, Seneca Hotel, Lowes Theatre, Laube's Old Spain Restaurant, Sagamore Hotel, Chamber of Commerce, Central Presbyterian Church, Powers Hotel.

Now, the following list over circuits furnished Station WHAM.

St. Paul's Church.

Sibley, Lindsey & Curr Company.

Seneca Hotel.

Rochester Gas & Electric Corporation.

Obenbach Coffee Shop.

Eastman School of Music.
Madison High School.
Monroe High School.
Washington Junior High School.
Jefferson Junior High School.
Benjamin Franklin High School.
[fol. 358] Brick Presbyterian Church.
Building No. 5, Edgerton Park.
Palace Theatre.
Lake Avenue Baptist Church.

By Mr. McDowell:

Q. These circuits are furnished to these spot locations for what purpose?

A. To pick up at the spot location material or entertainment which the radio broadcast station sends out over the air.

Q. In other words, programs are broadcast from these spot locations?

A. Programs are originated at these spot locations and broadcast from the transmitter.

Q. Now, just describe the operation that takes place when that broadcast takes place from the spot location, so far as the use of these lines is concerned.

A. The operation is a very complicated proposition. I do not think you will want it. Just what do you mean?

Q. Does it go over this line to the studio of the broadcasting company or does it go direct to the transmitter?

A. The program originated at these locations goes direct to the studio of the broadcast corporation.

Q. Do you know how it is handled there?

A. I do not understand the question.

Mr. Nixon: Do you know how it is handled there?

The Witness: How it is handled at the studio?

By Mr. McDowell:

Q. Yes.

[fol. 359] A. I do not.

The Examiner: Do not they plug in and then it goes direct to the transmitter?

The Witness: That is a very easy way of stating it. Of course, it eventually gets to the transmitter, but by asking

me do I know what is done in the studio, why, there is a lot of apparatus put on at the studio that I do not know much about. It eventually anyway gets to the transmitter, the circuit.

By Mr. McDowell:

Q. Does the Rochester Telephone Corporation furnish battery service to the lines connecting the spot locations?

A. It does not.

Q. Who supplies the battery, do you know?

A. If there is any battery supplied it is supplied by the broadcast corporation.

Q. The Rochester Telephone Company furnishes nothing in connection with these wires except it just puts the wires there and that is all?

A. It furnishes absolutely nothing but the dead wires.

Q. Do these lines, or any of them, terminate on the frames of the Rochester Telephone Corporation?

A. These wires pass through the cables and through the terminating frames in the central offices.

Q. And then where do they go?

A. A circuit originating at one of these spot locations would naturally extend direct into the central office in which this place was located. From there it would extend direct to the studio of the broadcast company.

Q. Why does it extend into the central office of the tele- [fol. 360] phone company?

A. Because the cables and wires of a telephone system all emanate or distribute from a central office.

Q. Well, is this wire tied in or connected with anything in the central office at all?

A. Just what do you mean by "anything"?

Q. Well, any facility of the telephone company.

A. No facilities, no.

Q. Well, to anything else in the central office of the telephone company?

A. This wire comes into the central offices enclosed in a cable. It is terminated on what is termed a frame. From that frame, from the termination of one cable to another, a jumper is extended connecting the two cables together. That is the means of reaching the locations that I have mentioned.

Q. There is no current between the two cables at all?

A. There is absolutely no energy furnished by the telephone corporation.

Q. Describe what you call a jumper between the two cables.

A. A jumper is merely a piece of wire, a pair of wires to connect the two cables. In other words, it is a means of extending the cable from one termination to another termination.

Q. What is the purpose of that termination in th telephone office, that is what I want to know?

A. To connect the cables together.

By the Examiner:

[fol. 361] Q. Are there 11 wires that go into the telephone company from the spots and 11 wires that go out of the telephone company to WHEC?

A. Yes.

Q. Or is there just one wire that goes to WHEC?

A. Eleven wires come into the central office from these respective locations, and eleven wires extend out. Now, the eleven-wire statement is not exactly correct, because I think I testified previously that there were two pairs of wires at each one of these eleven locations.

Q. Eleven circuits instead of eleven wires?

A. Yes, sir.

Q. That is right.

By Mr. McDowell:

Q. Does the Rochester Telephone Corporation furnish special loading coils for these lines?

A. It does not.

Q. To neither transmitter station, nor the spot locations, nor any of them?

A. It furnishes no loading coils on these circuits whatsoever.

Q. Then after these lines are installed you have nothing to do with them, is that correct?

A. We have absolutely nothing to do with them.

Q. Do not you service them?

A. If one of them should become destroyed or damaged we repair it.

Q. What type of line is it? Is it the same type of line that is used in the regular telephone service?

[fol. 362] A. Are you referring to all of these wires, these pairs as a group, or are you referring to some particular wire?

Q. Are any of these circuits furnished different in any way from regular telephone circuits?

A. None of these circuits are different in any way from regular telephone circuits.

Q. Not in the type of wire, or anything else?

A. We use the same wires as we use in the same circuits in telephone transmission.

Q. Have you ever had occasion to service any of these wires?

A. Do you mean by that was it necessary ever to repair any of these wires?

Q. Any kind of service, yes.

A. Yes, surely, they would be repaired.

Q. Do you inspect them regularly?

A. Not any more than we inspect any other wire.

Q. Do you inspect them the same as you do inspect your other wires?

A. It is not necessary to inspect them. They are constantly inspected by the broadcasting corporations.

Q. Do they come into your central office and do you inspect them at that end?

A. It is not necessary to inspect them from that end.

Q. Why?

A. Because they terminate in the studios.

Q. Are the broadcasting companies liable for misuse in [fol. 363] case excess battery is applied to the leased pairs?

A. The current flow, that is the amount of current flow, is specified, and as to what the liability of the broadcast company would be I could not say.

Q. How is it specified?

A. It is written into the agreement, or contract, or whatever you want to call it.

Q. Then you do know that there is a contract or agreement?

A. I know there is one. I showed you one here a few minutes ago.

The Examiner: They are going to furnish whatever there is.

Mr. McDowell: I ask that they furnish copies of any and all agreements, contracts, and so forth, whether they are on a card or otherwise.

The Examiner: With the certification of it.

Mr. McDowell: Of the telephone corporation and the broadcasting stations.

Mr. Nixon: Certification by the present corporation?

The Examiner: That is right. All the existing contracts, agreements, or understandings, verbal or written, between WHEC and WHAM and the Rochester Telephone Corporation.

Mr. McDowell: And also these spot locations, as they call them.

Mr. Nixon: I understand that.

The Examiner: That is part of the same thing.

By the Examiner:

Q. Is WHEC a member of any chain, National Broadcast- [fol. 364] ing or Columbia Broadcasting System?

The Witness: Yes, WHEC transmits programs that originate on the Columbia Broadcasting System.

By the Examiner:

Q. Now, how are the programs which come on the chain programs brought into the studio of WHEC?

A. They are brought in on pairs that are leased to the New York Telephone Company.

Q. To the New York Telephone Company?

A. Yes, sir.

Q. And the New York Telephone Company, you lease the wires to the New York Telephone Company?

A. We lease the pairs of wires to the New York Telephone Company, yes.

Q. Then the New York Telephone Company in turn lease these wires to WHEC?

A. I would not say that directly, because I believe there is some connection between the broadcast company and the Columbia people. I do not know that these wires in turn are leased by the New York Company to WHEC.

Q. Now, how are these wires that you lease to the New York Telephone Company, which go to WHEC for handling the chain programs, handled in your exchange?

A. The chain programs are brought into Rochester on the toll lines of either the New York Telephone Company or the American Telephone and Telegraph Company, right into

the city and terminate on equipment belonging to them, located at 95 North Fitzhugh Street in the City of Rochester.

Q. That is that same switchboard we have been hearing [fol. 365] about?

A. That is the same building.

Q. That is the same switchboard too that we have been hearing about?

A. No, these wires do not terminate on that switchboard, they terminate in that building, you see.

Q. On what switchboard?

A. The toll switchboard, I assume you are referring to?

Q. They do not terminate on the toll switchboard?

A. Not on that toll switchboard, no.

Q. Where do they terminate?

A. They terminate on terminal racks in that building. They do not go through a switchboard of that character.

Q. Do they go through any switchboard at all, or are they connected up direct?

A. They are connected up direct.

Q. So there is no need of any physical action on the part of any individual?

A. When they are connected up?

Q. Yes.

A. No.

Q. They are continued to be connected up?

A. Yes.

Q. Do those wires have any power in them?

A. The wires that we lease to the New York Telephone Company connecting the broadcast studios with 95 North Fitzhugh Street, there is no current furnished by the Rochester Telephone Corporation on those wires.

[fol. 366] Q. Who furnishes that current?

A. As a matter of fact, I do not think there is any current, except at the time of broadcasting.

Q. Now, is the same true of WHAM?

A. The same is true, yes, sir.

Q. And the Rochester Telephone Corporation has nothing to do with the chain programs coming in from out of Rochester to these stations except in so far as they lease wires to the New York Telephone Company?

A. It has absolutely nothing to do with these programs.

Q. Does the Rochester Telephone Corporation lease to the New York Telephone Company any wires for any pur-

pose similar to this one here, to these broadcasting companies? Does it run any wires directly which do not go through the switchboard of the Rochester Telephone Corporation?

A. Let me get your question, please. Does the Rochester Telephone Corporation lease any wires to the New York Telephone Company?

Q. Yes.

A. Any other wires?

Q. Yes.

A. For broadcast purposes?

Q. No, for any purposes, which go direct to any office or any individual within Rochester, within your territory, without going through your switchboard.

A. Yes.

Q. Who?

[fol. 367] A. The Rochester Telephone Corporation leases wires to the New York Telephone Company for other purposes. We have mentioned here teletype service, possibly some telegraph service.

Q. Anything else?

A. That is all I can think of right now, sir.

Q. Does it lease any wires for any business houses that have direct lines, for instance, from New York City to Rochester, which are direct connections?

A. If there are any such stations located in Rochester, it would.

Q. And those are known as private, leased wires, are they not?

A. Private, leased lines, yes.

Q. Private, leased lines?

A. I do not happen to know of any of them, but there may be.

Q. Now, if the Rochester Telephone Corporation did not lease or rent these lines from these broadcasting station studios to the transmitter would it be possible for the broadcasting companies to have their own wires?

A. Yes, it would be possible, but I would say not practical.

Q. Then it would be possible, would it, under the franchise which the Rochester Telephone Corporation has with the City of Rochester?

A. It would only be possible if they obtain a franchise for that purpose.

Q. And it would also be necessary for them to get the [fol. 368] consent of the Rochester Telephone Corporation?

A. I do not know.

Q. Under the franchise?

A. I do not know.

Q. You do not know the terms of the franchise?

A. I do not.

Q. So that the facility furnished to the broadcasting companies by which they put on the air the programs from their studios, are furnished by the Rochester Telephone Corporation?

A. Well, I would not admit that the facilities were furnished. In connection with putting a program on the air there are a great many facilities. We merely furnish a pair of wires.

Q. That is one of the facilities?

A. One, yes.

Q. At least one of the facilities?

A. Yes.

Q. You grant that?

A. Yes.

Q. These are the only two broadcasting stations in Rochester?

A. Yes, they are.

Q. Or in the territory which is served by the Rochester Telephone Corporation?

A. They are the only two leasing any wires from us, from the Rochester Telephone Corporation.

Q. Are there any other broadcasting stations in the area served by the Rochester Telephone Corporation?

[fol. 369] A. Not to my knowledge.

The Examiner: Any further questions?

By Mr. McDowell:

Q. You stated that the Rochester Telephone Corporation leases lines to the New York Telephone Company which are used in broadcasting service?

A. Yes, sir.

Q. You have also stated that there is electric current used on those lines only during times of broadcasting. That is correct, is it not?

The Examiner: He stated they did not furnish it, it was furnished by the New York Telephone Company.

By Mr. McDowell:

Q. Does the New York Telephone Company furnish electric current for the lines which are leased today by the Rochester Telephone Corporation and in turn leased by the New York Telephone Company to the broadcasting company, or the A. T. and T., for that purpose?

A. What circuits are you referring to now?

Q. The circuits leased by the Rochester Telephone Corporation to the New York Telephone Company which are in turn leased by the New York Telephone Company and utilized in broadcast service, either to the A. T. and T. or the broadcasting station?

A. You are asking me who furnishes the battery current or the energy on those lines?

Q. Yes.

A. I don't know.

Q. You do not know whether the New York Telephone [fol. 370] furnishes any current or not?

A. I know the Rochester Telephone Corporation does not, that is all I know.

Q. Do you know whether the New York Telephone Company does?

A. I do not.

Mr. McDowell: I do not know of anything else.

The Examiner: Are there any other questions?

Mr. Nixon: No more questions.

The Examiner: Do you want to ask some questions of Mr. Boylan?

Mr. McDowell: Yes.

Whereupon JOHN P. BOYLAN, a witness called on behalf of the Respondent, having been previously duly sworn, was recalled and testified further as follows:

Further cross-examination.

By Mr. McDowell:

Q. You are the same John P. Boylan who testified here before, are you not?

A. Yes.

Q. I would like to ask you, Mr. Boylan, if you will, to state what is the highest amount, the highest charge paid

per call by the Rochester Telephone Corporation to the New York Telephone Company on calls originating in the Rochester area and received in the Rochester area?

A. Charged to the subscriber?

Q. Yes.

[fol. 371] A. Charged to the subscriber?

Q. The highest charge for a call, an intra-territorial call.

The Examiner: You do not mean charged to the subscriber.

Mr. Nixon: A toll charge is what he means.

Mr. McDowell: A toll charge, the highest toll charge.

The Witness: Thirty-five or 40 cents.

By Mr. McDowell:

Q. What is the lowest?

A. Fifteen cents.

Q. What would the average be there, about?

A. Well, from the standpoint of revenue, it would be a guess on my part.

Q. That is all right. Just approximate it as near as you can guess.

A. Probably 28 or 30 cents.

Q. And out of those calls which are ticketed at the New York Telephone Company board the New York Telephone Company would receive 24.08 per cent of that charge, would they not?

A. Would receive 24 cents per message. It being understood, or course, that there is no charge by the New York Telephone Company for a similar incoming call.

Q. I am only inquiring about calls that originate in the territory and terminate in the territory.

A. Well, it would not be fair to state that an originating call is 24 plus cents per message.

Q. That is what the contract calls for?

Mr. Nixon: Let him finish please.

[fol. 372] The Witness: It makes no reference to the fact that all incoming messages are free.

By Mr. McDowell:

Q. You have testified to that before?

A. Yes.

Mr. McDowell: That is all.

By The Examiner:

Q. You were an official of the Rochester Telephone Corporation at the time that the preferred stock in the amount of $4,800,000 was held by the New York Telephone Company, when this preferred stock became the second preferred stock?

A. Yes, I was.

Q. Were you consulted about this transaction?

A. How is that?

Q. Were you consulted about this transaction?

A. I was aware of the transaction, but the financial matters of the corporation have been handled since its inception by the chairman of our board.

Q. Now, was there any other transaction on the part of the Rochester Telephone Corporation which required the consent of the New York Telephone Company, as was required in the matter which I have just mentioned?

A. None that I can recall.

Q. The issuance of bonds, or otherwise?

A. No, sir.

Q. Were you present at the meeting of the board of directors when this matter was discussed?

A. The matter of subordinating the first?

[fol. 373] Q. The matter of subordinating the first.

A. I believe I was.

Q. Were minutes made of that meeting?

A. Yes, sir.

Q. Was there an agreement of any kind between the New York Telephone Company and the Rochester Telephone Corporation at that time in regard to that matter?

A. I presume there was.

The Examiner: The Examiner will ask counsel for respondent if there has been furnished for the record any documentary evidence of the agreement which was made at that time.

Mr. Nixon: Yes. One of the exhibits here, which was the certificate of increase and classification of capital stock, is the agreement by which that change was accomplished. If you want the minutes of the directors' meeting which authorized the execution of that certificate I will be very glad to furnish it.

The Examiner: I wish you would, sir. Are there any further questions?

Mr. McDowell: I would like to have them furnish the minutes of the first meeting of the Rochester Telephone Corporation.

Mr. Nixon: The first meeting of the directors, the organization meeting?

Mr. McDowell: Yes.

M. Nixon: I will do that.

The Examiner: Is there anything further?

Mr. McDowell: I just have one more question of Mr. [fol. 374] Boylan.

By Mr. McDowell:

Q. Mr. Boylan, you have spoken of the fact that there was no charge being made for incoming messages?

A. Yes.

Q. The incoming messages were free?

A. Yes.

Q. Where the Rochester Telephone Corporation does not pay on incoming messages it is true, is it not, that some other connecting company does, if the call originated in another company's territory?

A. That is correct.

Q. In other words, the New York Telephone Company would be paid by the originating company in some other territory?

A. If the call originated in a company other than its own.

Mr. McDowell: That is all.

By Mr. Nixon:

Q. Is the Rochester Telephone Corporation saved some money by reason of the fact that no charge is made on incoming calls?

A. Well, you must consider the charge as a whole. That is, the New York Company schedules originating calls from the subscribers of the Rochester Telephone Corporation and it also delivers incoming calls to the subscribers of the Rochester Telephone Corporation. Now, the basis of charge is on originating calls only, the assumption being that the number of incoming calls equal the number of out-[fol. 375] going calls.

Q. Have your studies indicated that that is about the fact?

A. That is approximately true. So that if you made an effort to get up the real cost of switching messages, that is incoming and originating, you divide 24 cents by two.

Q. Making a net cost for this charge of 12 cents, is that correct?

A. That is correct.

Mr. Nixon: That is all.

Mr. McDowell: That is all.

The Examiner: Are you going to put in any evidence?

Mr. McDowell: I have just one witness that I would like to ask a question or two.

The Examiner: You may go ahead.

Whereupon GEORGE J. DEMPSEY, a witness called on behalf of the Commission, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McDowell:

Q. State your name.

A. George J. Dempsey.

Q. Where do you live, Mr. Dempsey?

A. My Washington residence is at 522 Tuckerman Street, Northwest.

Q. What is your business or occupation?

A. I am employed as an engineer with the Federal Com- [fol. 376] munications Commission.

Q. How long have you been so employed?

A. As an engineer?

Q. With the Federal Communications Commission.

A. I became connected with the Federal Communications Commission in December, 1934.

Q. And in what branch of the service are you chiefly occupied?

A. Well, telephone engineering mostly. That is taking into consideration traffic transmission and various other activities.

Q. Will you state your past experience as a telephone engineer?

A. In 1924 I entered the employment of the New York Telephone Company in New York and continued with the New York Telephone Company until about 1930 as a transmission engineer, and also outside plant engineer. From

1930 until 1933 I was employed as a telephone and telegraph engineer with the Interstate Commerce Commission, and then from 1933 until I entered the employment of this Commission I was employed as a communications engineer with the Signal Corps of the United States Army.

Q. What had been your experience, if any, prior to 1924?

A. Well, in 1914, after finishing high school, why, I was employed with the Hercules Powder Company as ballistic engineer at Camden, New Jersey and ended the service in 1917, when I went with the engineer corps of the United States Army. After being discharged in 1919 I attended [fol. 377] the Ranseleer Polytechnic Institute at Troy, New York and graduated as mechanical engineer. After graduating from the Ranseleer Polytechnic Institute in 1923 I entered the Clarkson College of Technology and was graduated from Clarkson College of Technology in 1924 with a degree of Bachelor of Science in Electrical Engineering.

Q. In the course of your experience have you had opportunity or occasion to observe the operations of various telephone companies in various localities?

A. Yes, I have.

Q. Are you familiar with the method of operation of various telephone companies in their individual territories?

A. Yes, quite a number of them.

Q. I will ask you whether or not you know of or did you ever hear of any telephone company in the United States which is unable to complete calls on its own system, which originates and terminates in its own territory?

Mr. Nixon: That is objected to as incompetent, irrelevant and immaterial, not within the issues prescribed, to be decided by this order under which we are acting.

The Examiner: He may answer the question. Note the exception.

Mr. Nixon: Exception.

The Witness: I have never heard of another telephone company that operated under those conditions——

By Mr. McDowell:

Q. During your experience as a telephone engineer——

The Witness (continuing): With the exception of the Rochester Telephone Corporation.

[fol. 378] By Mr. McDowell:

Q. During your experience as a telephone engineer have you had occasion to observe individual companies in that respect?

A. Yes, I have.

Q. In their operations.

A. Yes, I have.

Q. In what states in particular?

A. New York, New Jersey, Delaware, Pennsylvania and Maryland.

Mr. McDowell: That is all.

The Examiner: Any questions?

Cross-examination.

By Mr. Nixon:

Q. You say you observed the operation of various telephone companies in various localities, is that correct?

A. Yes, I have.

Q. Will you name some of the companies with whose operations you are familiar?

A. Well, there is the Diamond State Telephone Company.

Q. What one?

A. The Diamond State Telephone Company.

Q. Where is that located?

A. It operates within the State of Delaware. The Rochester Telephone Corporation and New York Telephone Company, and Northern New York Telephone Company, Jamestown Telephone Corporation, Bell Telephone Company of Pennsylvania, Chesapeake & Potomac Telephone Company of Baltimore City.

Q. Have you made a special study of operations of each of these companies with respect to their ability to complete [fol. 379] a call within their own territory without the assistance of anyone else?

A. I have made quite a thorough study of various traffic requirements, traffic and engineering requirements of the various companies.

Q. Have you made a study of the companies which you enumerated for the special purpose of determining whether or not any or all of those companies were able to complete calls within their own territories without outside assistance?

A. I stated, to my knowledge, that I know of no companies that were unable to make calls that way.

Q. I am asking you if you made any study on that subject so that your statement in regard to your knowledge is worth something.

A. Yes, I have.

Q. Is worth more than it appears to be on its face value. When have you made the studies?

A. I made the studies within the last week.

Q. Have all of your studies in that connection been made within the past week?

A. Well, various others have come to me from the knowledge I have had of these various companies. As transmission engineer it is necessary for me to know the operations and traffic difficulties.

Q. You never heard of any company until last week that was unable to complete a telephone call within its own territory without the use of another's facilities, did you?

[fol. 380] A. I was quite familiar with the operation of the Rochester Telephone Corporation.

Q. When did you become familiar with it?

A. Well, I became familiar with it in 1925, when I was with the New York Telephone Company located in Buffalo, New York, as transmission engineer.

Q. Did you make a study of the situation at the Rochester Telephone Corporation at that time?

A. No. The territory of the Rochester Telephone Corporation is so small, and I knew the territory pretty well, so I was able to decide that.

Q. What you mean is from your general knowledge of the telephone business you concluded that you knew how the Rochester Telephone Corporation conducted its business, is that correct?

A. Well, the New York Telephone Company's toll lines at that time passed through the Rochester Telephone Corporation territory and I knew the majority of the towns. We used to check the transmissions on our lines and the lines connecting with various Rochester Telephone Corporation offices, such as Brockport and a number of other offices, therefore I was quite familiar with the Rochester Telephone Corporation operations.

Q. Did you make a special study at the exchange office at 95 North Fitzhugh Street to determine its method of operation with respect to completing calls within its own territory?

A. I picked up experience from time to time. During the time I was with the New York Telephone Company in [fol. 381] Buffalo there was quite close cooperation with the Rochester Telephone Corporation with regard to toll business, and in my numerous visits to the Rochester Telephone Corporation area from time to time a person would be bound, who was interested in the telephone industry, to pick up a considerable amount of information.

Q. From your general knowledge of the telephone situation in Western New York you concluded that you knew how the Rochester Telephone Corporation was handling its toll business intra-territorially, is that a fact?

A. Yes, I concluded that.

Q. Now, is it also not a fact that you never heard of a telephone company that was unable to complete a call within its own territory without the intervention of another carrier, until you heard of the case of the Rochester Telephone Corporation?

A. I so stated.

Q. Is it not also true that your whole investigation of the subject of what companies were able to do that without outside facilities and which ones could not has not all been confined to the past week?

A. Well, the telephone companies——

Q. Answer yes or no.

A. Confined to the past week, and my knowledge as a telephone engineer, and in connection with the various problems from time to time.

Q. Your knowledge as an engineer leads you to the conclusion that there is no parallel case, is that not correct?

[fol. 382] A: I stated that there was no parallel case, to my knowledge.

Q. That is right. You reached that conclusion by concluding, from your own general knowledge, that there is not any parallel situation, is that right?

A. Yes.

Q. I want you to tell me what special investigation, if any, you have made in the past week to see whether or not there is any parallel.

A. I stated the various companies.

Q. Have you seen any of the companies you mentioned in the past week?

A. Yes, I have.

Q. Which one?

A. The Diamond State Telephone Company.

Q. Where is that located?

A. It is located in the State of Maryland with headquarters in Philadelphia.

Q. Is that the only one you have seen?

A. The Bell of Pennsylvania.

Q. All right. Any others?

A. And the Chesapeake & Potomac Telephone Company of Baltimore City.

Q. Every one of those companies that you have named are Bell Companies, are they not?

A. Yes, they are.

Q. Have you made any investigation or examination of a single independent telephone company to see whether or not there is a parallel situation in the whole United States to [fol. 383] one that is disclosed by the testimony in this case?

A. Well, I——

Q. Answer yes or no.

A. I know that——

Q. Pardon me. Please answer yes or no. You either have or haven't.

The Examiner: Answer yes or no and then explain.

Mr. Nixon: Read the question, Mr. Reporter.

(The question was read by the reporter.)

The Witness: Not on examination within the past week. I have quite a thorough knowledge of the workings of the Jamestown Telephone Corporation located in Chautauqua County, New York.

By Mr. Nixon:

Q. Have you made any investigation of the Jamestown Telephone Company's plant or exchanges to determine how it handles inter-territorial messages?

A. We used to have quite a bit of dealings with the Jamestown Telephone Company. I used to have quite a bit of dealings with the Jamestown Telephone Corporation. I made surveys of their property and surveys with regard to the New York Telephone Company lines within their territory.

Q. How recently?

A. Well, that was from 1925 up until 1928.

Q. That is for a period of three years from 1925 to 1928 you claim to know something about the operation of the Jamestown Telephone Company's property, is that so?

A. Yes.

Q. Do you know anything about its operations to know [fol. 384] how its toll calls, inter-territorially, were handled in that period?

Mr. McDowell: Pardon me, just a moment. Did you say intra-territorially?

Mr. Nixon: I said "inter-territorially."

Mr. McDowell: The direct examination was directed purely to intra-territorial business, as to competing calls wholly within its territory.

Mr. Nixon: I am sorry I used the wrong word. I mean intra-territorially.

Mr. McDowell: I ask that the record be corrected wherever he used the word inter-territorially.

Mr. Nixon: I am quite willing to have it corrected. It should be "intra-territorially."

The Witness: Yes, I have a very good idea as to how they were handled.

By Mr. Nixon:

Q. Did you see them handled?

A. Yes, I did.

Q. Do you know whether or not the New York Telephone Company had a switchboard at the premises of the Jamestown Telephone Company at that period?

A. No, they had not.

Q. Do you know that they did not have one?

A. Yes.

Q. You know that of your own knowledge?

A. Yes.

Q. In 1925 to 1928?

A. Yes.

[fol. 385] Q. Do you know anything about the situation at Jamestown today?

A. No, I do not know anything about the situation there today, but I think the situation today exists the same as it was then.

Mr. Nixon: I ask the answer be stricken out as not responsive. What he thinks I am not interested in.

By Mr. Nixon:

Q. Tell me the name of any other independent telephone company which you have investigated recently for the purpose of determining how that telephone company's intra-territorial toll calls are handled?

A. Well, last fall I had an occasion to make an investigation of the Inter-Mountain Telephone Company.

Q. Where is that located?

A. That is located in Bristol, Virginia.

Q. In Bristol, Virginia?

A. Yes.

Q. Is that an independent company?

A. I think so.

Q. Did you ever make an investigation?

A. Yes.

Q. What did you discover with reference to its practice in that respect, the practice which we are speaking about?

A. As a rule they take care of their own calls.

Q. How big a company is that? How many stations does it have?

A. I think it has probably in the neighborhood of 5,000 [fol. 386] stations.

Q. You do not think that is comparable with the Rochester Telephone Corporation, do you, from your experience as a telephone man?

A. The Rochester Telephone Corporation is very much larger.

Q. It is in a class by itself?

A. In a class by itself.

The Examiner: Any further questions?

Mr. Nixon: No further questions.

Mr. McDowell: No further questions.

(Witness excused.)

The Examiner: I will ask counsel for the Commission: Do you introduce the questionnaire of the respondent?

Mr. McDowell: That was introduced by certified copies.

The Examiner: If there is no further testimony the Examiner requests the counsel for the respondent to present by February 29, 1936, briefs on the following questions:

1. What was the intention of Congress in the use of the words "control" and "controlled by" in Section 2 (b)(2) of the Communications Act of 1934?

2. Must the control be affirmatively exercised or does it mean the power to control the actions of the company in whole or in part?

3. Does the Federal Communications Commission have exclusive jurisdiction over the rates charged by a telephone or telegraph carrier for wire services provided to a radio broadcasting station where the line connecting is intrastate in character?

[fol. 387] 4. If the Federal Communications Commission does have jurisdiction over the rates charged by telephone or telegraph carriers for wire services provided to a radio broadcasting station where the line connecting is intrastate in character is the jurisdiction (a) limited to sections 202-205 of the Act, or, (b) conferred under the Act in its entirety?

Mr. Geiger: On behalf of the United States Independent Telephone Association may I have permission to file a brief on the questions which you have just outlined?

The Examiner: Certainly.

Mr. Geiger: Those questions relating to radio and authorization are of great interest to a number of our companies, other than the respondent, and I ask permission to file a brief for that reason.

The Examiner: Permission is granted. If there is no further evidence I will declare this hearing at an end.

(Whereupon, at the hour of 4:50 o'clock p. m., the hearing was closed.)

[fol. 388] March 15, 1936.

To: Federal Communications Commission.

From: Ward and Paul, Official Reporters.

Subject: Corrections in transcript of hearing on Docket 3293, Rochester Telephone Corporation Hearing of January 16, 1936.

Corrections are Made as per Instructions in Letter of February 29, 1936 from Herbert L. Pettey, Secretary

Page	Line	
198	7	Change words "tolls call" to "toll calls".
209	16	Between the words "Corporation" and "to" insert the word "connect".
215	25	Change word "northwest" to "northeast".
224	2	"delibered" should be "delivered".
244		Third line from bottom of page. Change the words "to this" to "at that" so that line will read "operator at that end to go into the main center", etc.
264	4	Last word, change "the" to "one".
264	5	Last word, change "plugs" to "plug".
264		Last line.—Word "services" should be "facilities".
289		Five lines from bottom of page. Change "F" to "Ave."
297	11	Insert word "names" between words "the without".
319	9	Change word "beyond" to "within".

TRAFFIC AGREEMENT

BETWEEN

NEW YORK TELEPHONE COMPANY

AND

ROCHESTER TELEPHONE CORPORATION

EFFECTIVE

January 1, 1929

TRAFFIC AGREEMENT

This Agreement effective as of the first day of January 19 29, between NEW YORK TELEPHONE COMPANY, a corporation under the laws of the State of New York, herein called BELL COMPANY, and ROCHESTER TELEPHONE CORPORATION a corporation under the laws of the State of New York, herein called CONNECTING COMPANY.

Physical connection shall be established and telephone communications interchanged between the system operated by CONNECTING COMPANY within the territory as shown on the annexed map marked Exhibit "A" and made a part hereof, and the system operated by BELL COMPANY, including systems of other companies with which BELL COMPANY connects, upon the following terms and conditions:

1. BELL COMPANY will connect its system with the system of CONNECTING COMPANY at the Bergen, Brockport, Canandaigua, Castile, Cohocton, Dansville, Fairport, Geneseo, Le Roy, Mt. Morris, Naples, Pavilion, Rochester, Warsaw and Wayland Central Offices and at such other points as are indicated on the map Exhibit "A" attached.

CONNECTING COMPANY will not, without the written consent of BELL COMPANY, connect the lines of BELL COMPANY with the exchanges or toll lines of any other individual, firm or corporation.

2. Each company will make the proper switchboard and other connections for direct and prompt communication between its patrons and the patrons of the other. The toll operating required in connection with communication interchanged hereunder shall be performed by the company designated in exhibit "B" hereto attached and made a part hereof.

3. With respect to all matters covered by this agreement, CONNECTING COMPANY will adopt and comply with BELL COMPANY'S directions as to routes over which communications are to be routed, and also with its operating methods and rules. CONNECTING COMPANY will require its patrons to observe the rules and regulations of BELL COMPANY and will upon request furnish the latter such information as it may reasonably require.

4. Each company will construct, equip, maintain and operate its system so that good telephone service shall be at all times furnished to the public, and each will, by itself or through others, furnish adequate toll and exchange factilities therefor.

5. The charges for all communications interchanged hereunder shall be in accordance with such rates as BELL COMPANY may from time to time establish or adopt. No charge shall be made in excess of such rates, except a reasonable charge for a messenger, when necessary, to notify a person for whom a call is received.

6. The amount to be received by each company for facilities furnished and services rendered hereunder shall be determined in accordance with the Basis of Settlement shown in exhibit "C" hereto attached and made a part hereof. Each company shall collect all charges payable by its patrons for communications originating or terminating on its system and shall account and be responsible to the other for the latter's share thereof. Each company shall keep proper records of its transactions hereunder and such records shall be at all reasonable times subject to inspection by the other. Accounts hereunder shall be adjusted and paid monthly and remittance in full shall be made by the debtor to the creditor within thirty (30) days after receipt of a statement covering the monthly settlement.

7. Each company shall take reasonable precautions in the location, construction and maintenance of its lines for protection against hazard and interference from foreign wire lines.

8. If either company shall default in the payment of any sum due hereunder, or shall violate any other provision of this agreement, and if such default or violation shall continue for thirty (30) days after written notice thereof, the other company may terminate this agreement forthwith by written notice.

In addition to the foregoing, BELL COMPANY may terminate this agreement forthwith if CONNECTING COMPANY, without the written consent of BELL COMPANY, connects the lines of BELL COMPANY with any lines other than of its own system within the territory as shown on said Exhibit "A."

9. The failure of either company hereto to comply with or to enforce or insist upon compliance by the other company with any of the terms and conditions of this agreement, or the waiver by either company hereto of the same in any instance or instances, shall not be construed as a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

10. Neither this agreement nor any of the rights or benefits hereunder shall be transferable or assigned by either company hereto without the consent in writing of the other, and any attempted transfer or assignment without such written consent shall be void and of no effect; nor shall this agreement or any of the rights or benefits hereunder inure or pass, without the written consent of BELL COMPANY, to any corporation merging or consolidating with CONNECTING COMPANY.

11. Except as to any sums due thereunder, this agreement cancels all previous agreements between the companies or their respective predecessors covering interchange of communications.

12. Unless sooner terminated as herein provided, this agreement shall continue in force until the first day of January , 19 30, and thereafter until terminated by thirty (30) days' prior notice in writing from either company to the other.

IN WITNESS WHEREOF, the respective companies have caused this agreement to be executed in their behalf this 15th day of January , 19 30

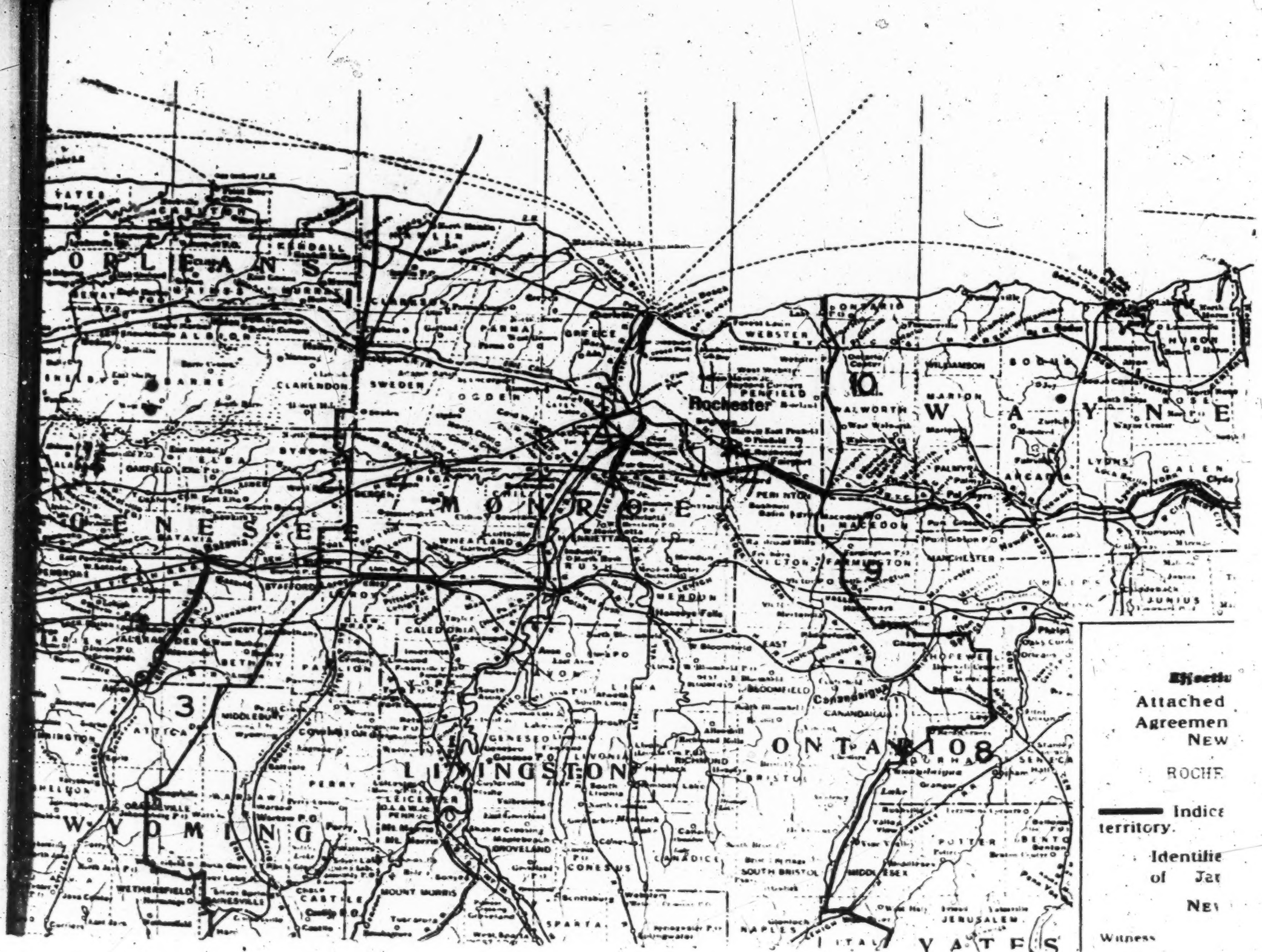
Witness: NEW YORK TELEPHONE COMPANY

(Sgd.) R. A. Murtaugh By (Sgd.) James B. Bubbell

Attest
Witness: ROCHESTER TELEPHONE CORPORATION

(Sgd.) W. J. O'Hara By (Sgd.) J. P. Boylan, Pres.
Secretary

(Seal)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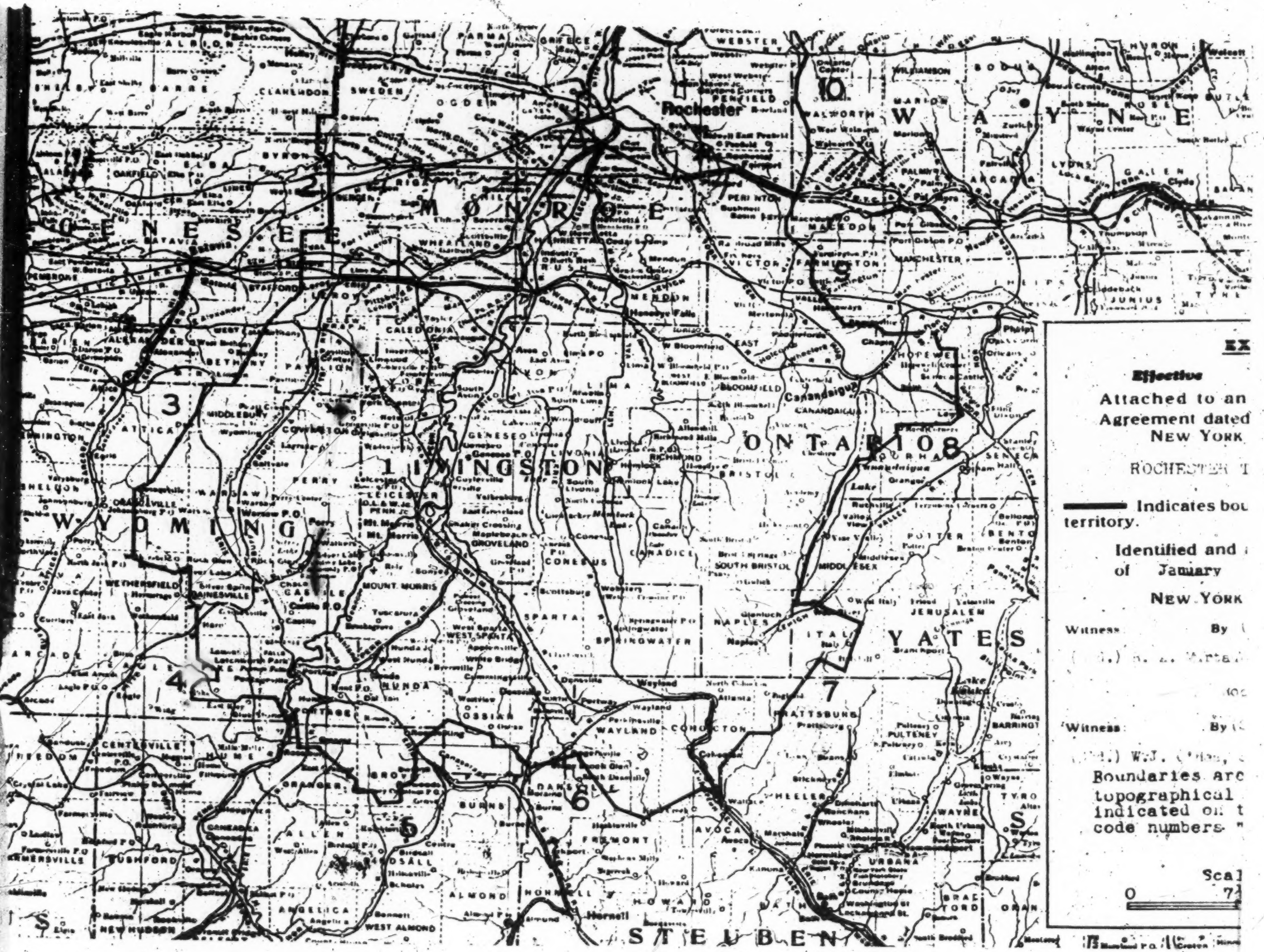
GENESEE
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Effective
Attached to an
Agreement dated
NEW YORK
ROCHESTER
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Identified and
of January
NEW YORK
Witness
By
Witness
By
Boundaries are
topographical
indicated on
code numbers
Scale
0

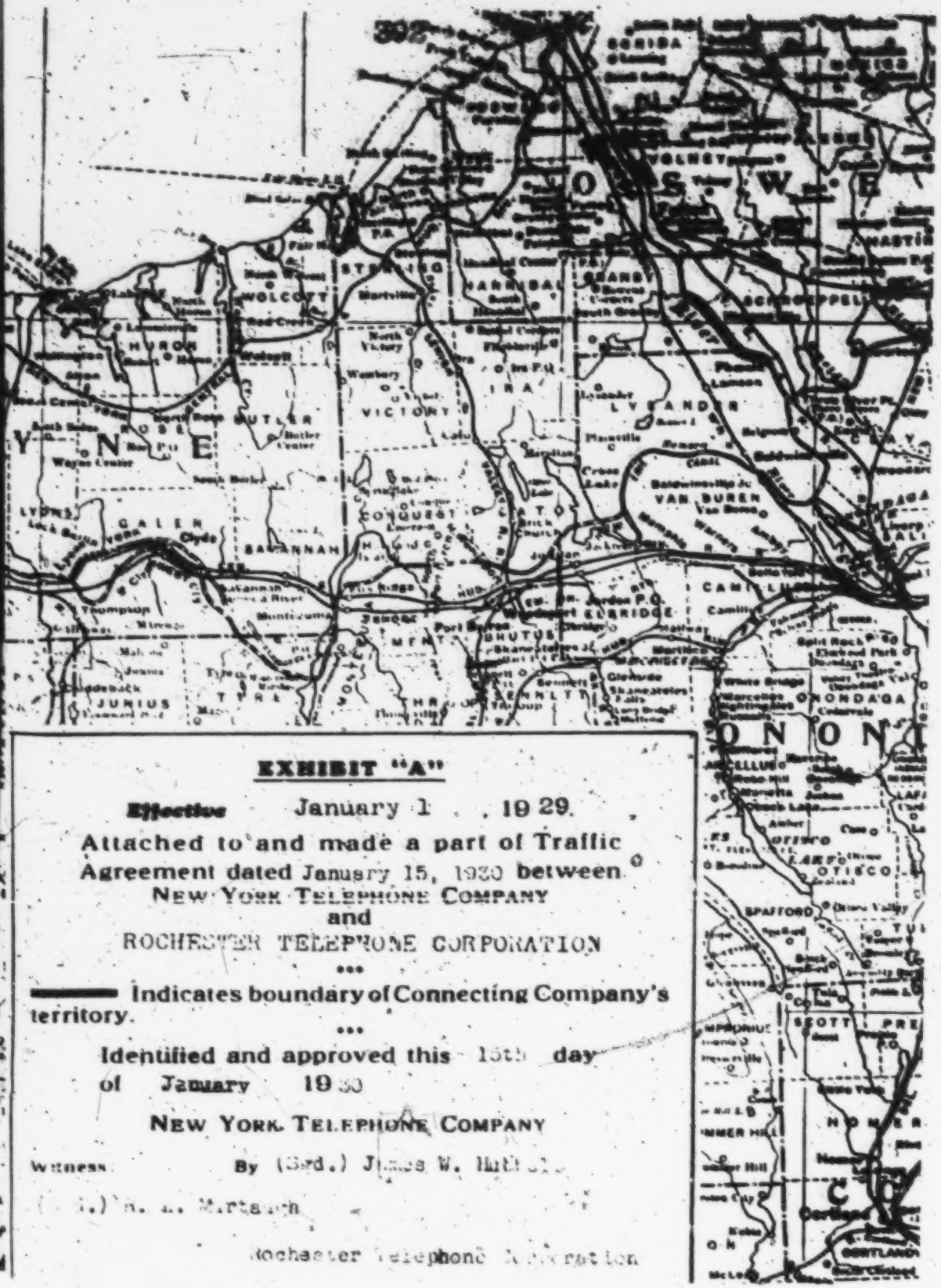


EXHIBIT "A"

Effective January 1 , 1929.

Attached to and made a part of Traffic Agreement dated January 15, 1930 between NEW YORK TELEPHONE COMPANY and ROCHESTER TELEPHONE CORPORATION

•••

——— Indicates boundary of Connecting Company's territory.

•••

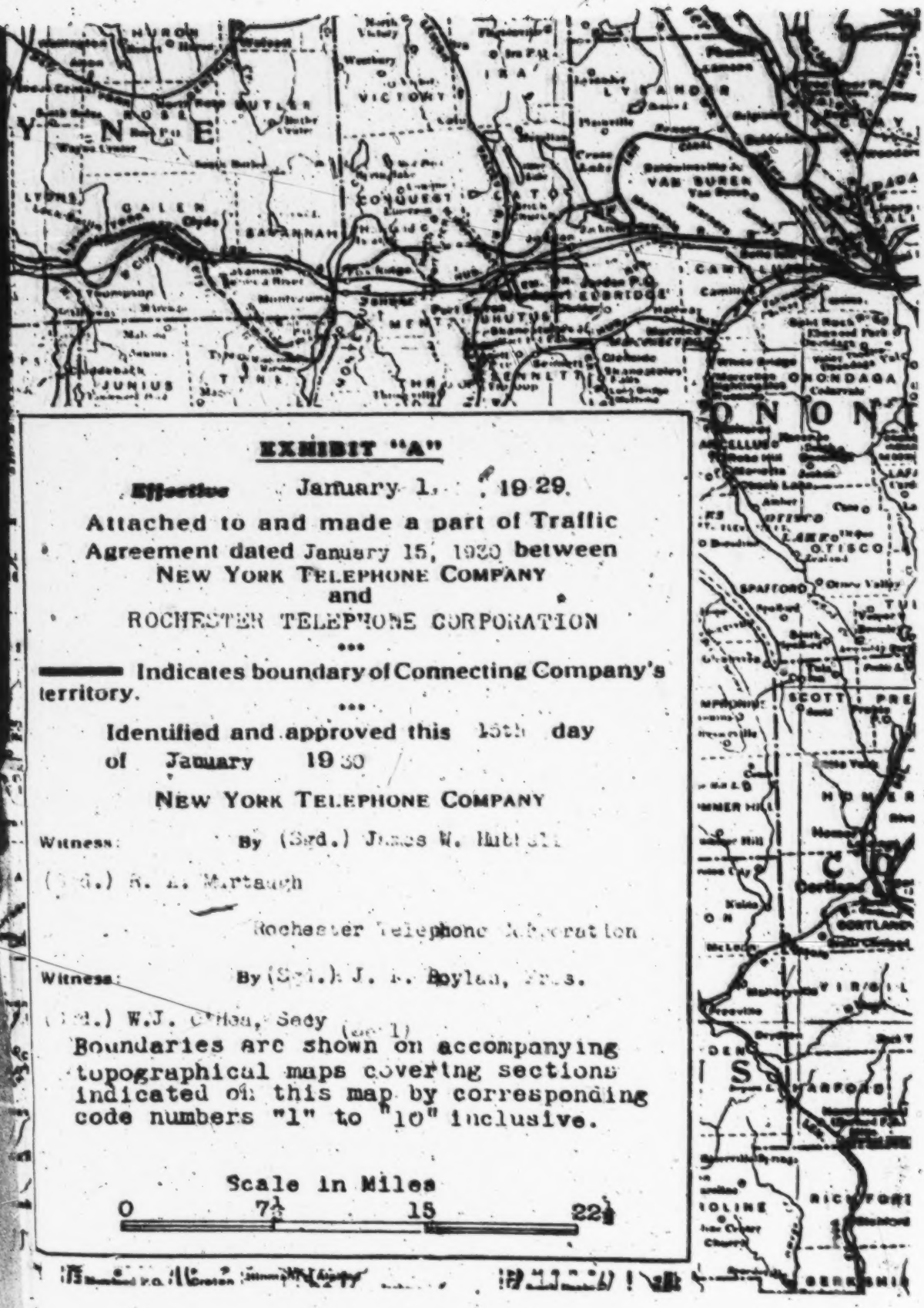
Identified and approved this 15th day of January 1930

NEW YORK TELEPHONE COMPANY

Witness By (Sgd.) James W. Millard

(Sgd.) H. A. Wartsbaugh

Rochester Telephone Corporation



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...

——— Indicates boundary of Connecting Company's territory.

...

Identified and approved this 15th day of January 1930

NEW YORK TELEPHONE COMPANY

Witness: By (Sgd.) James W. Hutchi...

(Sgd.) R. A. Murtaugh

Rochester Telephone Corporation

Witness: By (Sgd.) J. A. Boylan, Pres.

(Sgd.) W.J. O'Hea, Secy

(over)

Boundaries are shown on accompanying topographical maps covering sections indicated on this map by corresponding code numbers "1" to "10" inclusive.

Scale in Miles

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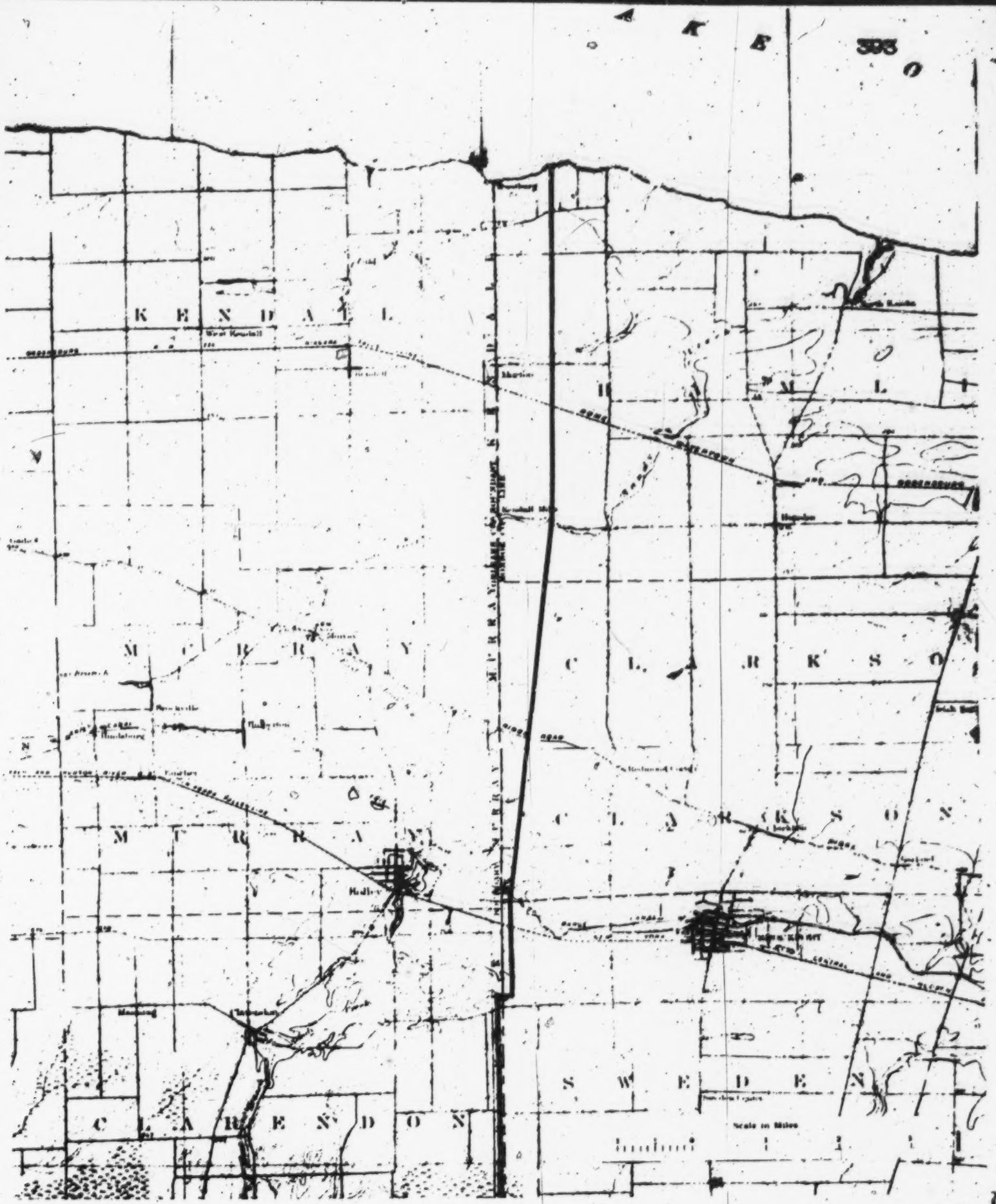
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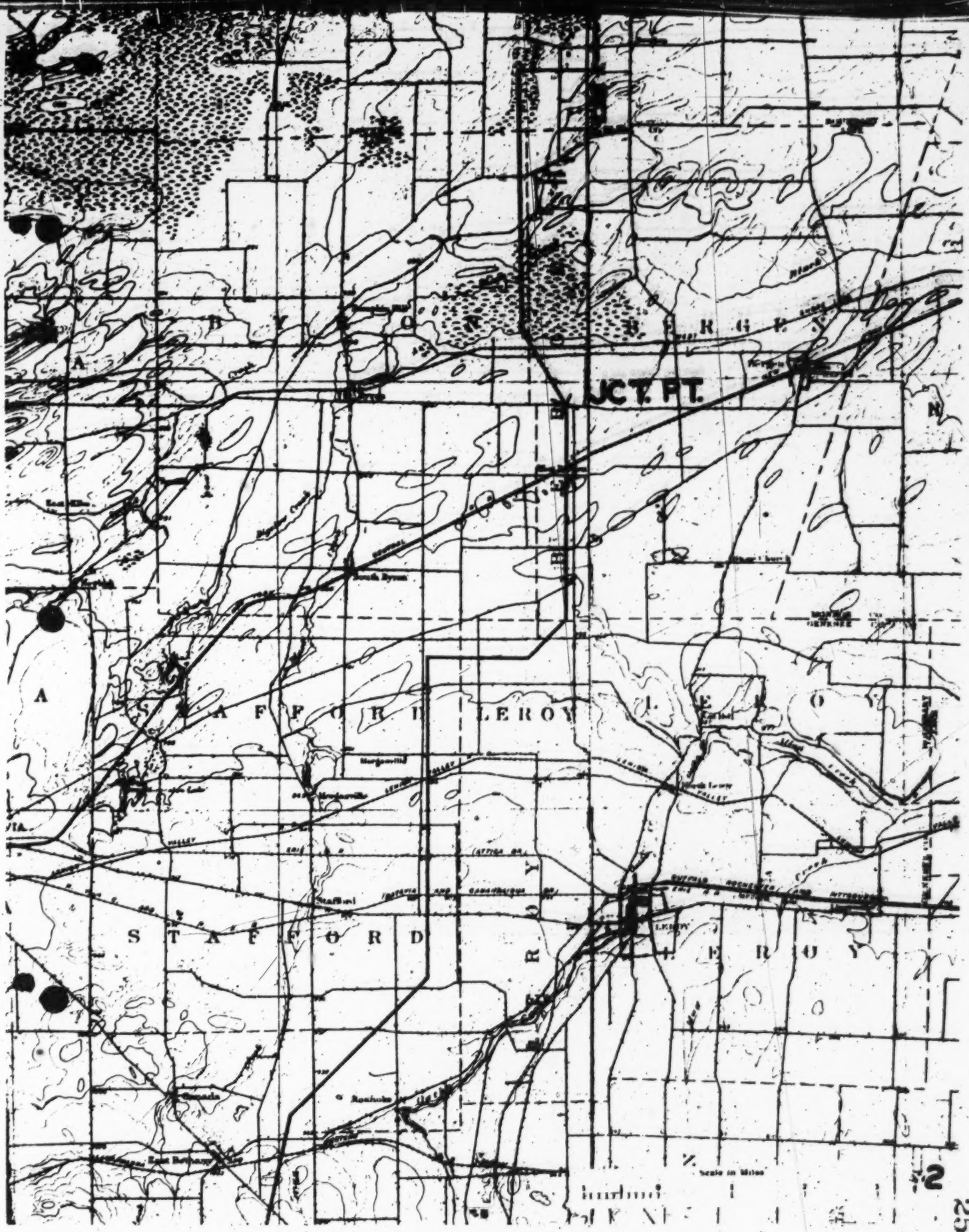
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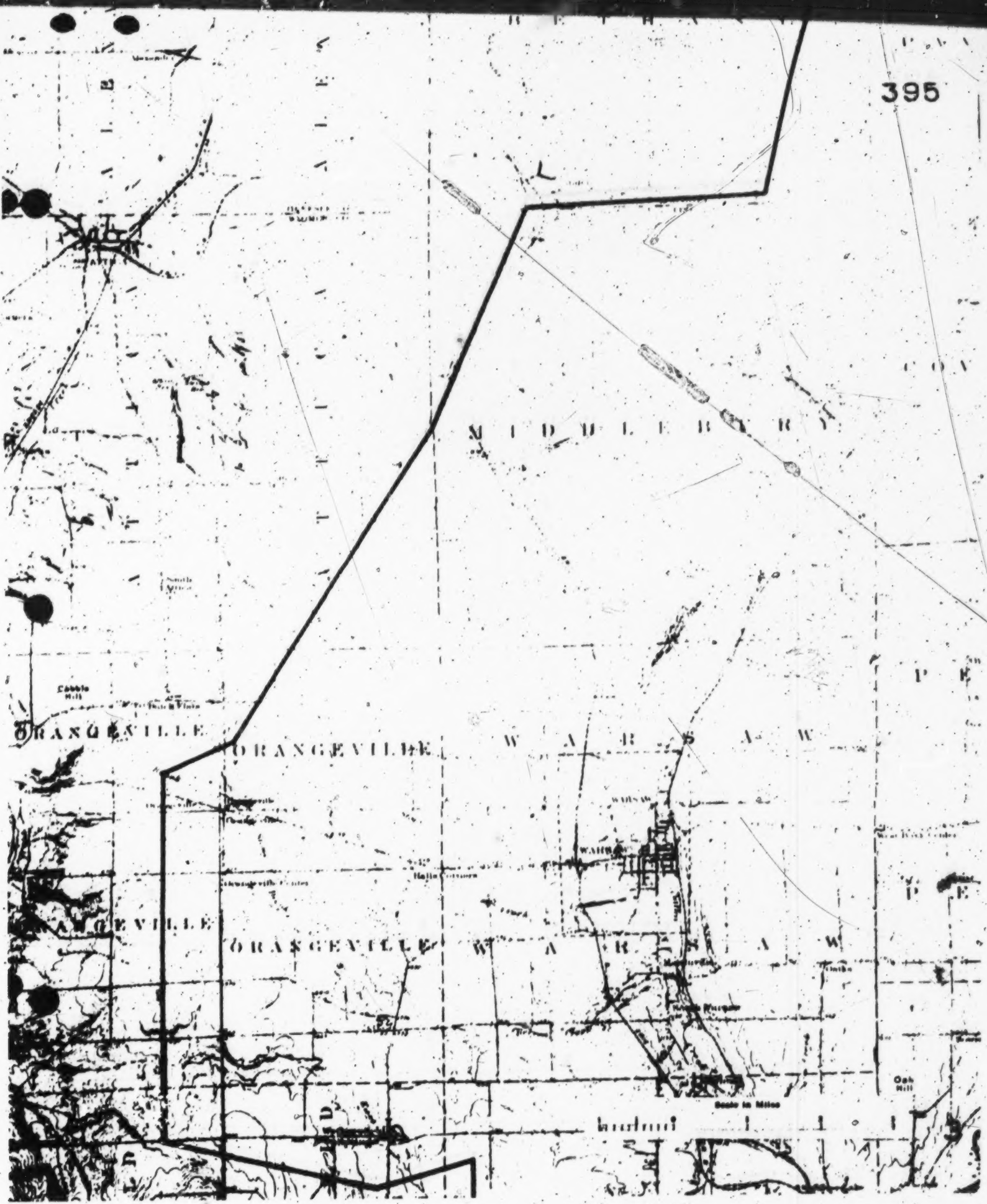
STAFFORD
LEROY
STAFFORD
LEROY


395
MIDDLEBURY
ORANGEVILLE
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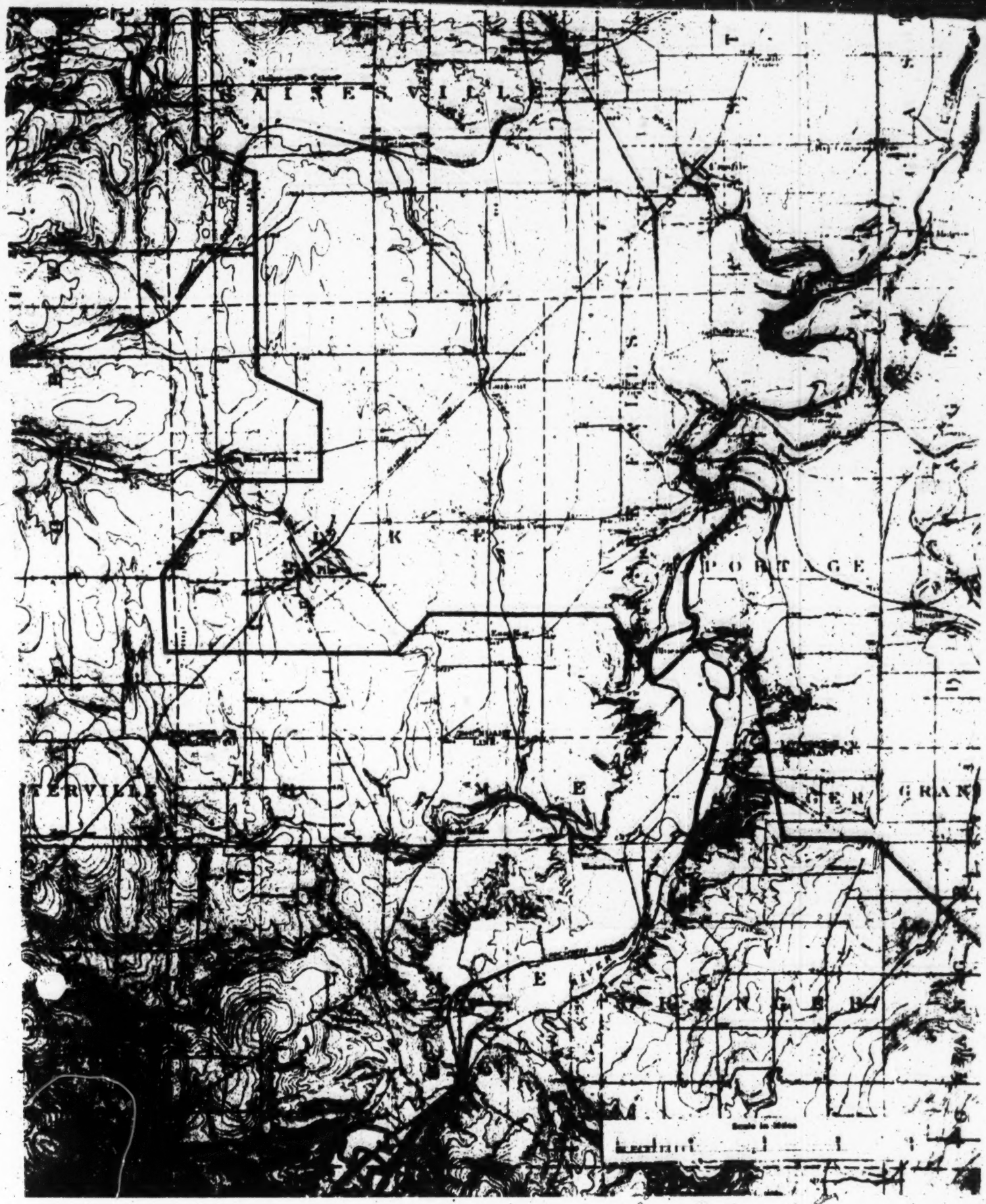
ORANGEVILLE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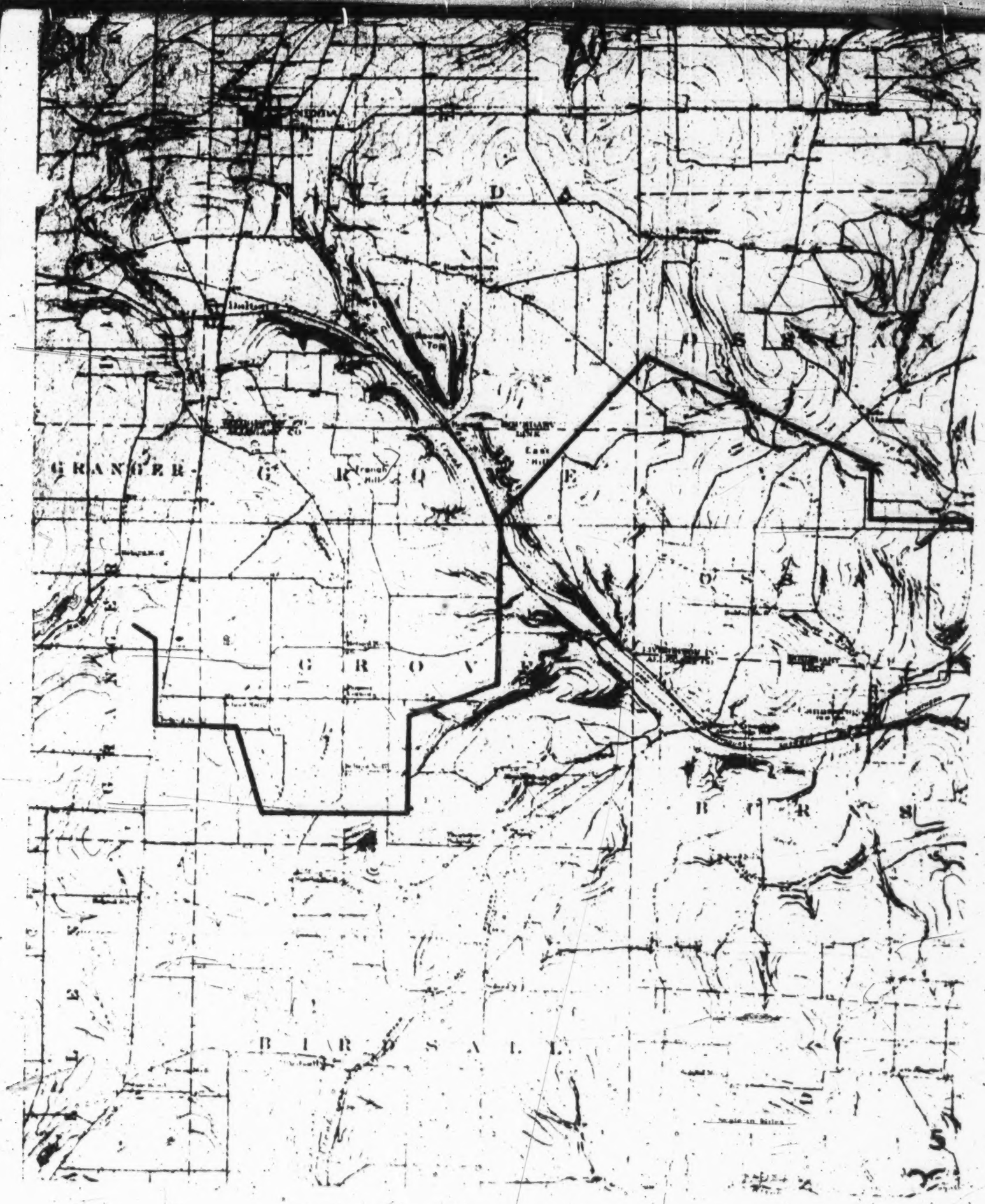
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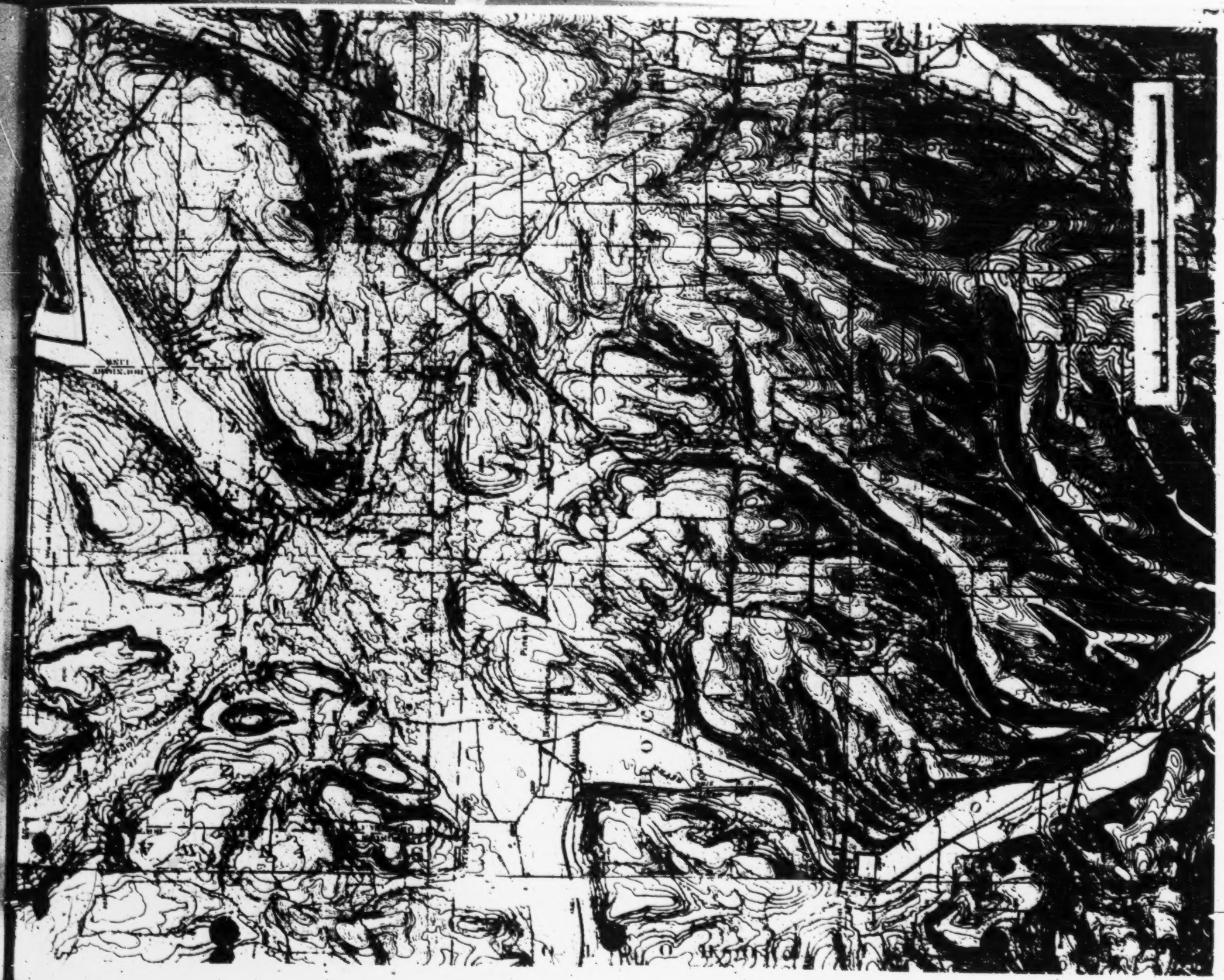
5

Scale in Miles



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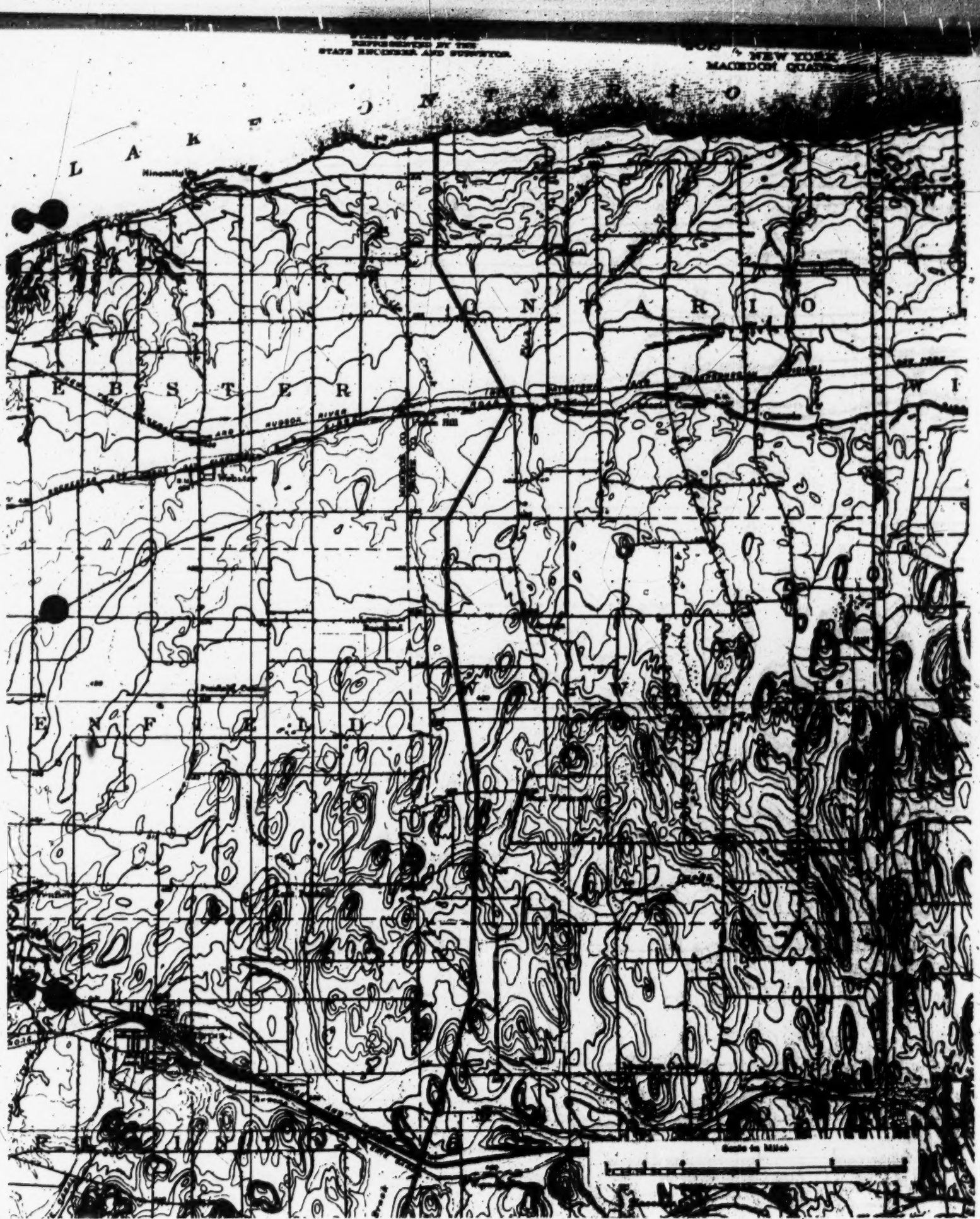
REPRESENTED BY THE
STATE ENGINEER AND SURVEYOR
NEW YORK
MACEDON QUADRANGLE
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E B S T E R
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Scale in Miles

EXHIBIT "B"

Attached to and made a part of Traffic Agreement dated January 15, 1930 between New York Telephone Company and Rochester Telephone Corporation

Toll Operating

Effective October 1 19 33

From the effective date hereof BELL COMPANY shall perform all Toll Operating required in connection with communications interchanged under said Traffic Agreement, except that CONNECTING COMPANY shall perform the Toll Operating required for communications

Originating at	Terminating at
Canandaigua and Tributaries	All points
Dansville " "	" "
Geneseo " "	" "
Warsaw " "	" "
Avon	Batavia
"	Byron
Bergen	Albion
"	Barre Center
"	Batavia
"	Byron
"	Holley
Brockport	Albion
"	Barre Center
"	Batavia
"	Byron
"	Holley
"	Kendall
Caledonia	Batavia
"	Byron
Churchville	Batavia
"	Byron
E. Rochester	Macedon
"	Palmyra

EXHIBIT "B"

Attached to and made a part of Traffic Agreement dated January 15, 1930 between New York Telephone Company and Rochester Telephone Corporation

Toll Operating

Effective October 1, 1933

From the effective date hereof BELL COMPANY shall perform all Toll Operating required in connection with communications interchanged under said Traffic Agreement, except that CONNECTING COMPANY shall perform the Toll Operating required for communications

Originating at	Terminating at
Fairport	Macedon
"	Ontario
"	Palmyra
"	Williamson
Hamlin	Albion
"	Barre Center
"	Holley
"	Kendall
Hilton	Albion
"	Barre Center
"	Holley
"	Kendall
LeRoy	Albion
"	Barre Center
"	Batavia
"	Byron
"	Holley
Pavilion	Batavia
"	Byron
Pittsford	Macedon
"	Palmyra
Scottsville	Batavia
"	Byron
Spencerport	Albion
"	Barre Center
"	Holley

EXHIBIT "B"

Attached to and made a part of Traffic Agreement dated January 15, 1930 between New York Telephone Company and Rochester Telephone Company

Toll Operating

Effective October 1, 1933

From the effective date hereof BELL COMPANY shall perform all Toll Operating required in connection with communications interchanged under said Traffic Agreement, except that CONNECTING COMPANY shall perform the Toll Operating required for communications

Originating at	Terminating at
Webster	Macedon
"	Marion
"	Ontario
"	Palmyra
"	Sodus
"	Williamson
For the Red Jacket Telephone Company	
Manchester)	All points routed via Canandaigua except Canandaigua
Shortsville)	
For the Seneca-Gorham Telephone Company	
Rushville)	All points routed via Canandaigua except Canandaigua
Stanley)	
Potter)	
For the New York Telephone Company	
Varysburg	All points except Arcade, Attica, East Aurora, Java, Warsaw

EXHIBIT "B"

Attached to and made a part of Traffic Agreement dated January 15, 1930 between New York Telephone Company and Rochester Telephone Corporation

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Toll Operating

Effective October 1, , 1933

From the effective date hereof BELL COMPANY shall perform all Toll Operating required in connection with communications interchanged under said Traffic Agreement, except that CONNECTING COMPANY shall perform the Toll Operating required for communications

Originating at	Terminating at
For the Fillmore Telephone Company	
Fillmore	All points routed via Warsaw except Warsaw

Identified and approved this 10th day of October 19 33.

Witness:

NEW YORK TELEPHONE COMPANY

(Sgd.) Ruth A. Murtaugh

By(Sgd.) James B. Hubbell
Vice President & General Manager

Attest
Witness:

ROCHESTER TELEPHONE CORPORATION

(Sgd.) W. J. O'Hea

By(Sgd.) J. P. Boylan
President

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EXHIBIT "C"

Attached to and made a part of Traffic Agreement dated January 15, 1930 between New York Telephone Company and Rochester Telephone Corporation

Basis of Settlement

Effective January 1, 1929

From the effective date hereof the amount to be received by each company for facilities furnished and services rendered in connection with traffic interchanged shall be determined as follows:

A. DEFINITION.

The term "Originating Message" shall only include sent-paid messages and received-collect messages.

B. COMMISSIONS.

1	2	3	4
Where Average Revenue per Originating Message is			
Over	But Not Over	Commission per Message	Additional Commission Per Message Where Toll Operating is Performed
$.05	$.075	$.04	$.01
.075	.10	.055	.015
.10	.125	.065	.02
.125	.15	.073	.024
.15	.175	.081	.028
.175	.20	.088	.032
.20	.225	.094	.036
.225	.25	.099	.04
.25	.275	.103	.044
.275	.30	.106	.048
.30	.325	.108	.052
.325	.35	.109	.056
.35	.375	.11	.06
.375	.40	.111	.064
.40	.425	.112	.068
.425	.45	.113	.072
.45	.475	.114	.076
.475	.50	.115	.08
.50	.55	.116	.084
.55	.60	.117	.088
.60	.65	.118	.092
.65	.70	.119	.096
.70	.75	.12	.10
.75	.80	.121	.104
.80	.85	.122	.108
.85	.90	.123	.112
.90	.95	.124	.116
.95	1.00	.125	.12
For each increase of $.10 in average revenue per message, add		.001	.004

1. The Commission shown in Column 3 of foregoing Table shall be computed on all originating messages and the amount to which each company is entitled thereunder shall be determined for a given month as follows:

a. Compute the average revenue per originating message by dividing the sum of the charges for such messages, including report charges, by the number of such messages during the month.

b. Ascertain from the foregoing Table the amount of commission per message corresponding to the average revenue per message.

c. Multiply the total number of such originating messages by the amount of commission per message so ascertained.

2. The Additional Commission shown in Column 4 of the foregoing Table applies where toll operating is performed as specified in Exhibit "B" and the amount to which each company is entitled thereunder shall be determined for a given month as follows:

a. Compute the average revenue per originating message for traffic handled as specified in Exhibit "B," by dividing the sum of the charges for such originating messages, including report charges, by the number of such messages during the month.

b. Ascertain from the foregoing Table the amount of additional commission per message corresponding to the average revenue per message.

c. Multiply the total number of such originating messages by the amount of additional commission per message so ascertained.

Where messages originate on the system of one company but the toll operating therefor is performed by the other company as specified in Exhibit "B," the latter company shall be entitled to receive the Additional Commission under Column 4 of the foregoing Table, determined as above for such messages.

3. The sum of the Commissions, determined as above from Columns 3 and 4 of the foregoing Table, is the total amount to be received by each company for facilities furnished and services rendered in originating and terminating communications interchanged under said Traffic Agreement, but does not include compensation for the use of exchange service facilities required to establish connection between an exchange station and the toll terminal plant, for the use of which facilities each company is compensated by its rates for exchange service.

C. PRO-RATE.

For all communications interchanged hereunder, each company shall be entitled to receive as its share of the toll charges, including report charges, the proportion of such charges that the length of its toll lines used therefor bears to the total length of the toll lines so used. Measurements shall be by air-line distance between the point or points of connection of the systems of the companies and the respective originating and terminating toll rate centers. Commissions shall first be deducted from the toll charges and the remainder shall be subject to Pro-rate.

To facilitate settlement between the companies the amount, to which CONNECTING COMPANY shall be entitled as Pro-rate, shall be determined from a study of the traffic interchanged during a month agreed upon between the companies, and equated as an amount per originating message of CONNECTING COMPANY.

Subsequent studies to determine whether there should be a change in the amount per originating message shall be made from time to time on request of either company, but not more often than once in six months unless rendered necessary by physical changes in the toll system of either company or by important changes in toll routing.

The total amount to which CONNECTING COMPANY shall be entitled as Pro-rate in any month, shall be determined by multiplying the amount per message so developed by the number of its originating messages during such month.

Settlements shall be made according to the amount per message developed as a result of the initial study, for all traffic interchanged from the effective date hereof until such time as the result of a new study shall be made effective. The amount per message developed by any subsequent study, shall become effective and settlements made in accordance therewith, for all traffic interchanged from and after the expiration of ninety (90) days after the first day of the period for which such study was made; provided, however, that where a study is made necessary by a physical change in the toll system of either company or by an important change in toll routing, the amount per message determined from such study, shall become effective and settlement made in accordance therewith, for all traffic interchanged from and after the date of said change.

D. TRANS-OCEANIC COMMUNICATIONS.

The above provisions as to Commissions and Pro-rate shall not apply to Trans-Atlantic and other similar Trans-Oceanic Communications originating or terminating on the system of CONNECTING COMPANY. In lieu of all charges for facilities furnished and services rendered in connection with Trans-Atlantic Communications, CONNECTING COMPANY shall be entitled to have included in the computations for ascertaining Commissions and Pro-rate, the number of messages and the same amount as if each such Trans-Atlantic Communication had been a person-to-person message to or from the City of New York.

E. MESSENGER CHARGES.

Charges for Messenger Service shall not be included in the amount upon which Commissions and Pro-rates are calculated. Each company shall reimburse the other company for such charges expended at the request of the company originating the message and any such amount shall be included in the monthly settlement between the companies.

Identified and approved this 15th day of January , 19 30 .

Witness: NEW YORK TELEPHONE COMPANY

(Sgd.) R. A. Murtaugh By (Sgd.) James W. Hubbell

Attest
Witness: ROCHESTER TELEPHONE CORPORATION

(Sgd.) M. J. O'Hea By (Sgd.) J. P. Boylan, Pres.
Secretary

(Seal)

274

EXHIBIT "C-1"

Attached to and made a part of Traffic Agreement dated January 15, 1930 between New York Telephone Company and Rochester Telephone Corporation amending Exhibit "C" and superseding Paragraph "D" thereof.

Basis of Settlement

Effective June 1, 1935.

From the effective date hereof Paragraph "D" of Exhibit "C" is hereby amended to read as follows:

D. COMMUNICATIONS TO OR FROM POINTS OUTSIDE THE UNITED STATES (EXCEPT CANADA, CUBA AND MEXICO) OR TO OR FROM SHIPS AT SEA.

On communications between points on the CONNECTING COMPANY'S system and points outside of the continental United States (except Canada, Cuba and Mexico) or ships at sea, the Commissions and Pro-rates will be determined in accordance with the above provisions, except that each such communication will be considered as a person-to person message between the CONNECTING COMPANY'S originating or terminating point and the BELL COMPANY'S control switchboard point at which connection is first established with Overseas or Ship-to-Shore Facilities.

Identified and approved this 6th day of June, 1935.

Witness: NEW YORK TELEPHONE COMPANY

(Sgd.) Ruth A. Murtaugh By (Sgd.) F. P. Lawrence
Vice President & General Manager

Witness ROCHESTER TELEPHONE CORPORATION

(Sgd.) Lucy R. Sheridan By (Sgd.) J. P. Boylan

SUPPLEMENTAL TRAFFIC AGREEMENT
Indirect Connecting Company

411

Effective January 1, 19 29

Under the provisions of Traffic Agreement effective the 1st day of January , 19 29 , between NEW YORK TELEPHONE COMPANY (therein described as BELL COMPANY) and ROCHESTER TELEPHONE CORPORATION (therein described as CONNECTING COMPANY), consent is hereby given by BELL COMPANY to the connection of its lines and system with the telephone system operated by the Dalton Telephone Company (hereinafter referred to as INDIRECT CONNECTING COMPANY) within the territory shown on the map attached hereto and marked Supplemental Exhibit "1," subject, however, to the following terms and conditions:

1. Such connection shall be made through the system of CONNECTING COMPANY and the arrangements therefor shall be such as may be from time to time agreed upon between CONNECTING COMPANY and INDIRECT CONNECTING COMPANY.
2. For the purpose of settlement between BELL COMPANY and CONNECTING COMPANY, under the terms and conditions of said Traffic Agreement, the system of INDIRECT CONNECTING COMPANY shall be deemed to be part of the system of CONNECTING COMPANY.
3. The consent hereby given shall not be deemed to be a waiver of any of the terms and conditions of said Traffic Agreement, and all the terms and conditions thereof, except as herein specifically amended or modified, shall continue in full force and effect and shall apply hereto in all respects as if the same had been specifically set out.
4. The consent hereby given shall be without prejudice to the right of BELL COMPANY, whenever in its opinion such a course may appear desirable, to make other arrangements for the connection of its lines with the system of INDIRECT CONNECTING COMPANY.
5. These arrangements may be terminated at any time by thirty (30) days' written notice given by one company to the other and shall be terminated by the expiration or termination of said Traffic Agreement.

Dated this 15th day of January , 19 30

NEW YORK TELEPHONE COMPANY

Witness:

(Sgd.) R. A. Murtaugh

By (Sgd.) James W. Hubbell

ACCEPTED:

ROCHESTER TELEPHONE CORPORATION

Attest
Witness:

(Sgd.) W. J. O'Hea
Secretary

By (Sgd.) J. P. Boylan, Pres.

(Seal)

SUPPLEMENTAL TRAFFIC AGREEMENT
Indirect Connecting Company

412

Effective January 1, 19 29

Under the provisions of Traffic Agreement effective the 1st day of January, 19 29 between NEW YORK TELEPHONE COMPANY (therein described as BELL COMPANY) and ROCHESTER TELEPHONE CORPORATION (therein described as CONNECTING COMPANY), consent is hereby given by BELL COMPANY to the connection of its lines and system with the telephone system operated by the Hilton Telephone Company (hereinafter referred to as INDIRECT CONNECTING COMPANY) within the territory shown on the map attached hereto and marked Supplemental Exhibit "1," subject, however, to the following terms and conditions:

1. Such connection shall be made through the system of CONNECTING COMPANY and the arrangements therefor shall be such as may be from time to time agreed upon between CONNECTING COMPANY and INDIRECT CONNECTING COMPANY.
2. For the purpose of settlement between BELL COMPANY and CONNECTING COMPANY, under the terms and conditions of said Traffic Agreement, the system of INDIRECT CONNECTING COMPANY shall be deemed to be part of the system of CONNECTING COMPANY.
3. The consent hereby given shall not be deemed to be a waiver of any of the terms and conditions of said Traffic Agreement, and all the terms and conditions thereof, except as herein specifically amended or modified, shall continue in full force and effect and shall apply hereto in all respects as if the same had been specifically set out.
4. The consent hereby given shall be without prejudice to the right of BELL COMPANY, whenever in its opinion such a course may appear desirable, to make other arrangements for the connection of its lines with the system of INDIRECT CONNECTING COMPANY.
5. These arrangements may be terminated at any time by thirty (30) days' written notice given by one company to the other and shall be terminated by the expiration or termination of said Traffic Agreement.

Dated this 15th day of January, 1930.

Witness:

(Sgd.) R. A. Murtaugh

NEW YORK TELEPHONE COMPANY

By (Sgd.) James W. Hubbell

ACCEPTED:

Attest
Witness:

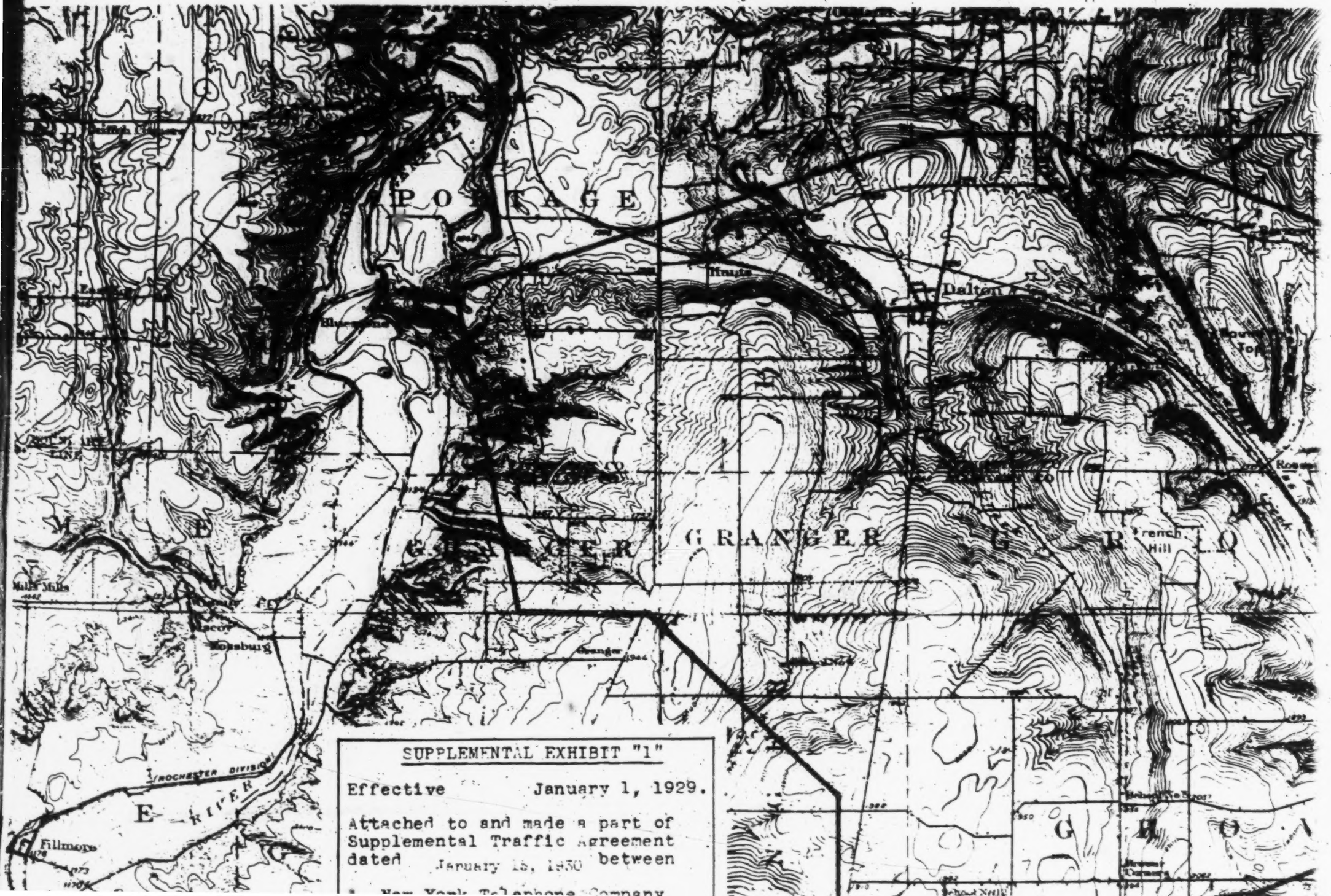
ROCHESTER TELEPHONE CORPORATION

(Sgd.) W. J. O'Hea
Secretary

By (Sgd.) J. P. Boylan, Pres.

(Seal)

277



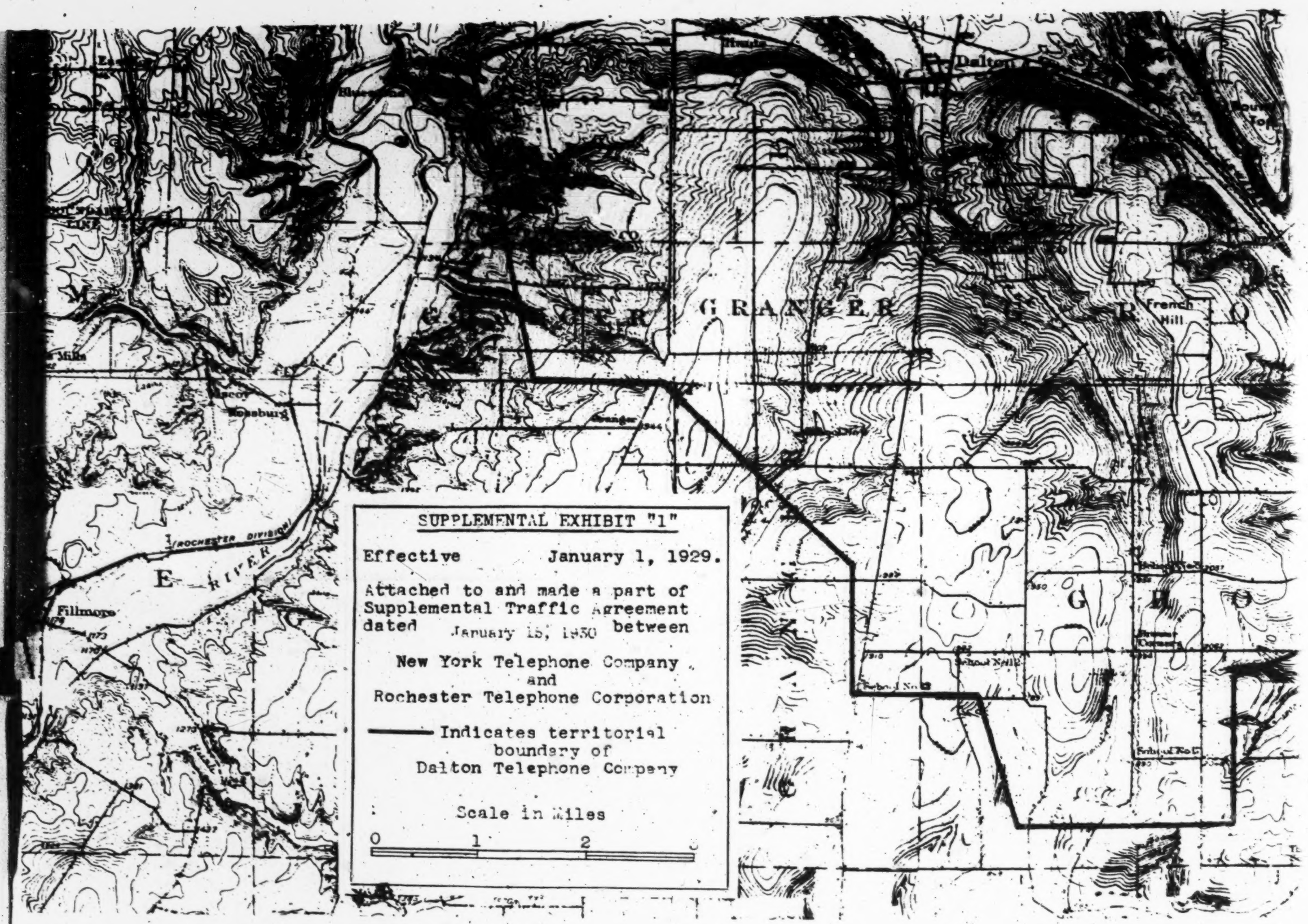
SUPPLEMENTAL EXHIBIT "1"

Effective January 1, 1929.

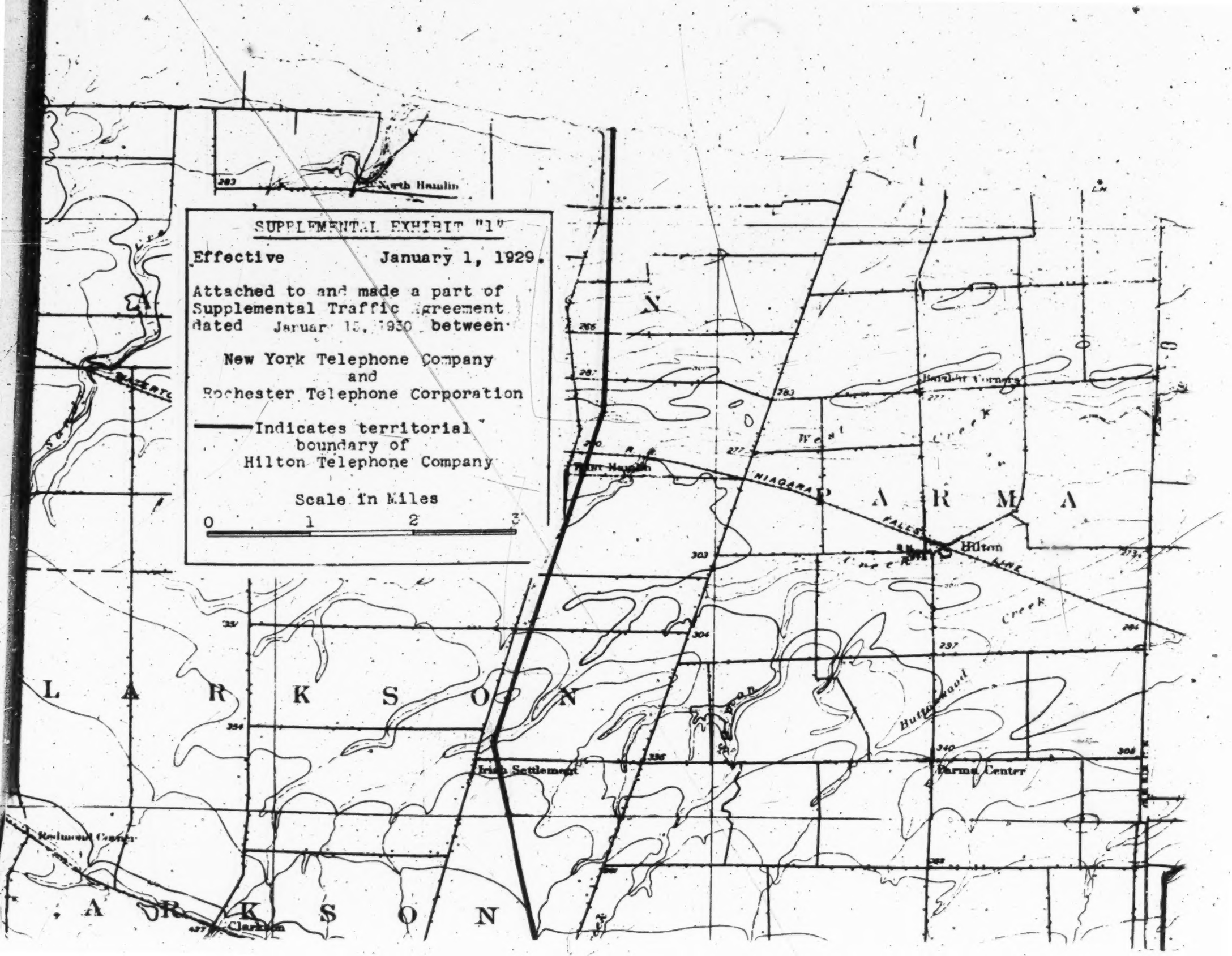
Attached to and made a part of Supplemental Traffic Agreement dated January 15, 1930 between

New York Telephone Company

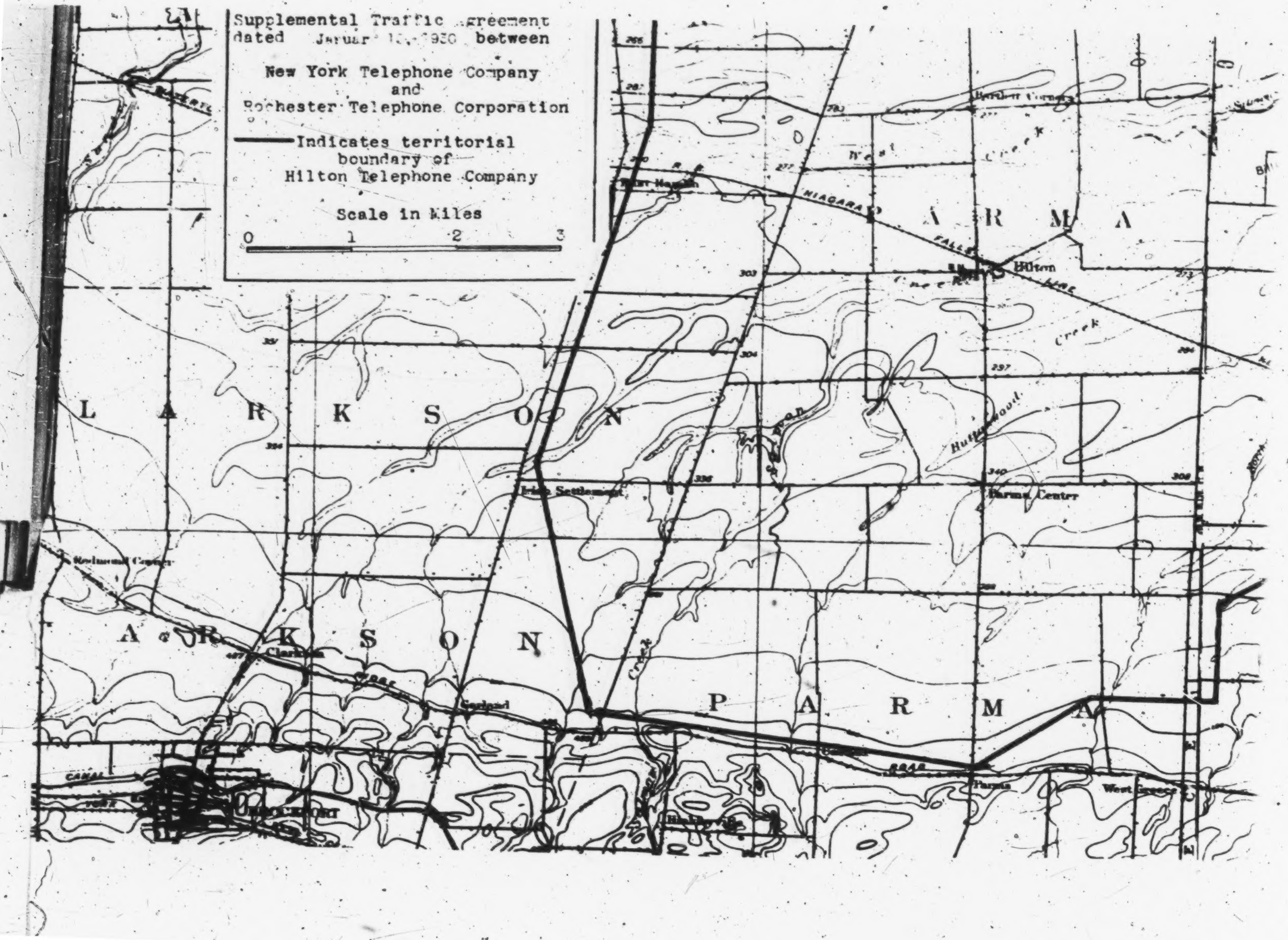
LINE
East
Hill
French
Hill

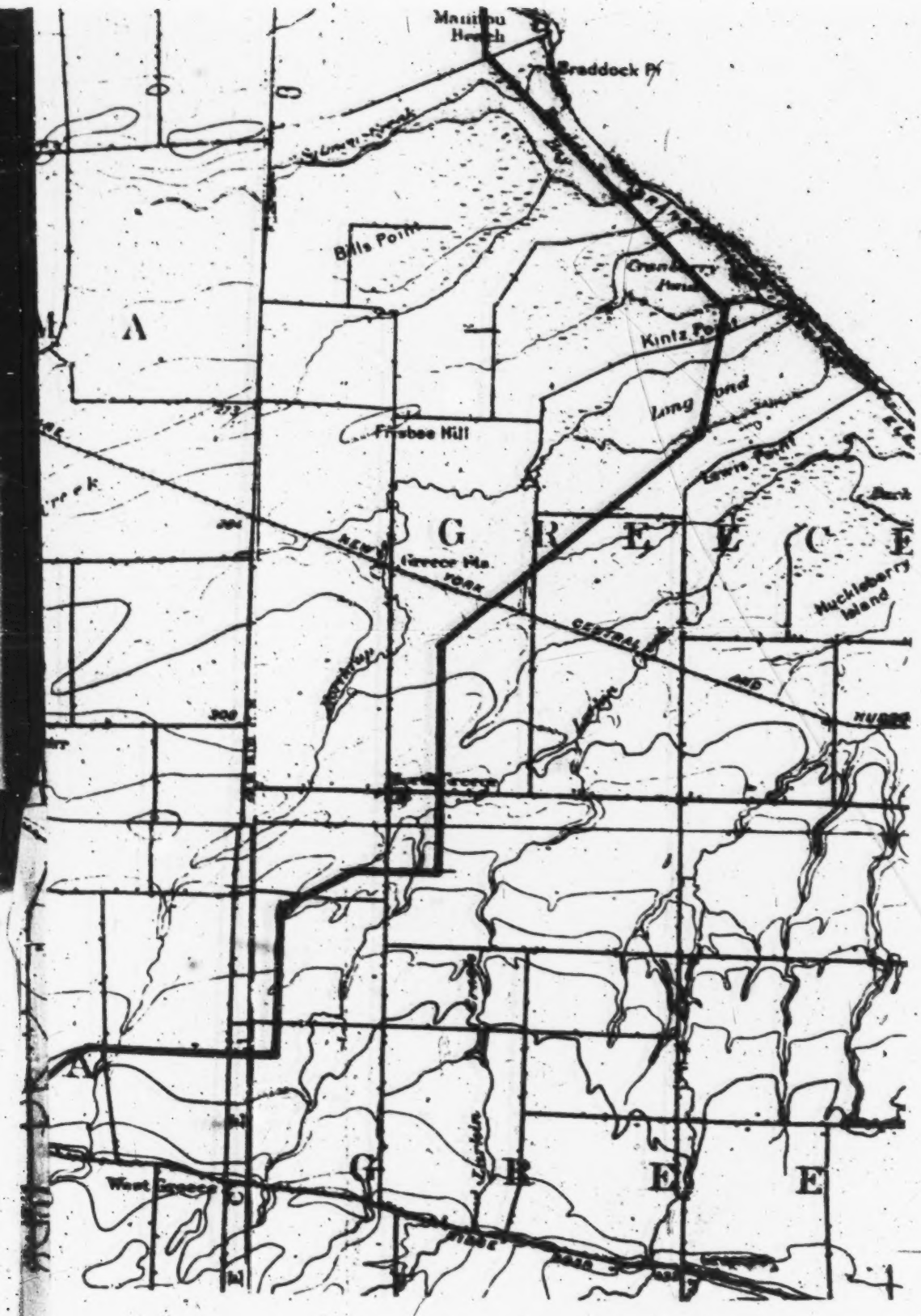

GRANGER
E RIVER
Fillmore
Rochester
Dalton
French Hill
Mills
Bacon
Roseburg
Rochester Division
SUPPLEMENTAL EXHIBIT "1"
Effective January 1, 1929.
Attached to and made a part of Supplemental Traffic Agreement dated January 15, 1930 between
New York Telephone Company
and
Rochester Telephone Corporation
Indicates territorial boundary of Dalton Telephone Company
Scale in Miles
0 1 2

LINE
East
Hill
French
Hill


SUPPLEMENTAL EXHIBIT "1"
Effective January 1, 1929.
Attached to and made a part of Supplemental Traffic Agreement dated January 15, 1930 between
New York Telephone Company
and
Rochester Telephone Corporation
Indicates territorial boundary of Hilton Telephone Company
Scale in Miles
0 1 2 3
North Hamlin
Hilton
Parma Center
Irish Settlement
Redmond Corners
Clarkson
PARMA
CLARKSON
NIAGARA FALLS LINE
Buttermilk Creek

Manitou Beach
Breddock Pt
Bells Path
Cranberry Island
Kintz Point
Long Pond
Frisbee Hill
Lewis Point
Back
Huckleberry Island
Creek
394
309
NEW
YORK
CENTRAL
R.R.
HUDSON
A
G
R
E
E
N
C
E


Supplemental Traffic Agreement
dated January 1, 1930 between
New York Telephone Company
and
Rochester Telephone Corporation
Indicates territorial
boundary of
Hilton Telephone Company
Scale in Miles
0 1 2 3
L A R K S O N
P A R M A
Hilton
Parma Center
Brockport
Clarkson
Garland
Parma
West Greece
NIAGARA
FALLS
Creek


Braddock Pt
Bills Point
Kintz Point
Firebee Hill
Lewis Point
Huckleberry Island
West Greece

SUPPLEMENTAL TRAFFIC AGREEMENT
Indirect Connecting Company

Effective January 1, 1929

Under the provisions of Traffic Agreement effective the 1st day of January, 1929, between NEW YORK TELEPHONE COMPANY (therein described as BELL COMPANY) and ROCHESTER TELEPHONE CORPORATION (therein described as CONNECTING COMPANY), consent is hereby given by BELL COMPANY to the connection of its lines and system with the telephone system operated by the Ogden Telephone Company (hereinafter referred to as INDIRECT CONNECTING COMPANY) within the territory shown on the map attached hereto and marked Supplemental Exhibit "1," subject, however, to the following terms and conditions:

1. Such connection shall be made through the system of CONNECTING COMPANY and the arrangements therefor shall be such as may be from time to time agreed upon between CONNECTING COMPANY and INDIRECT CONNECTING COMPANY.
2. For the purpose of settlement between BELL COMPANY and CONNECTING COMPANY, under the terms and conditions of said Traffic Agreement, the system of INDIRECT CONNECTING COMPANY shall be deemed to be part of the system of CONNECTING COMPANY.
3. The consent hereby given shall not be deemed to be a waiver of any of the terms and conditions of said Traffic Agreement, and all the terms and conditions thereof, except as herein specifically amended or modified, shall continue in full force and effect and shall apply hereto in all respects as if the same had been specifically set out.
4. The consent hereby given shall be without prejudice to the right of BELL COMPANY, whenever in its opinion such a course may appear desirable, to make other arrangements for the connection of its lines with the system of INDIRECT CONNECTING COMPANY.
5. These arrangements may be terminated at any time by thirty (30) days' written notice given by one company to the other and shall be terminated by the expiration or termination of said Traffic Agreement.

Dated this 15th day of January, 1930.

Witness:

NEW YORK TELEPHONE COMPANY

(Sgd.) R. A. Murtaugh

By (Sgd.) James W. Hubbell

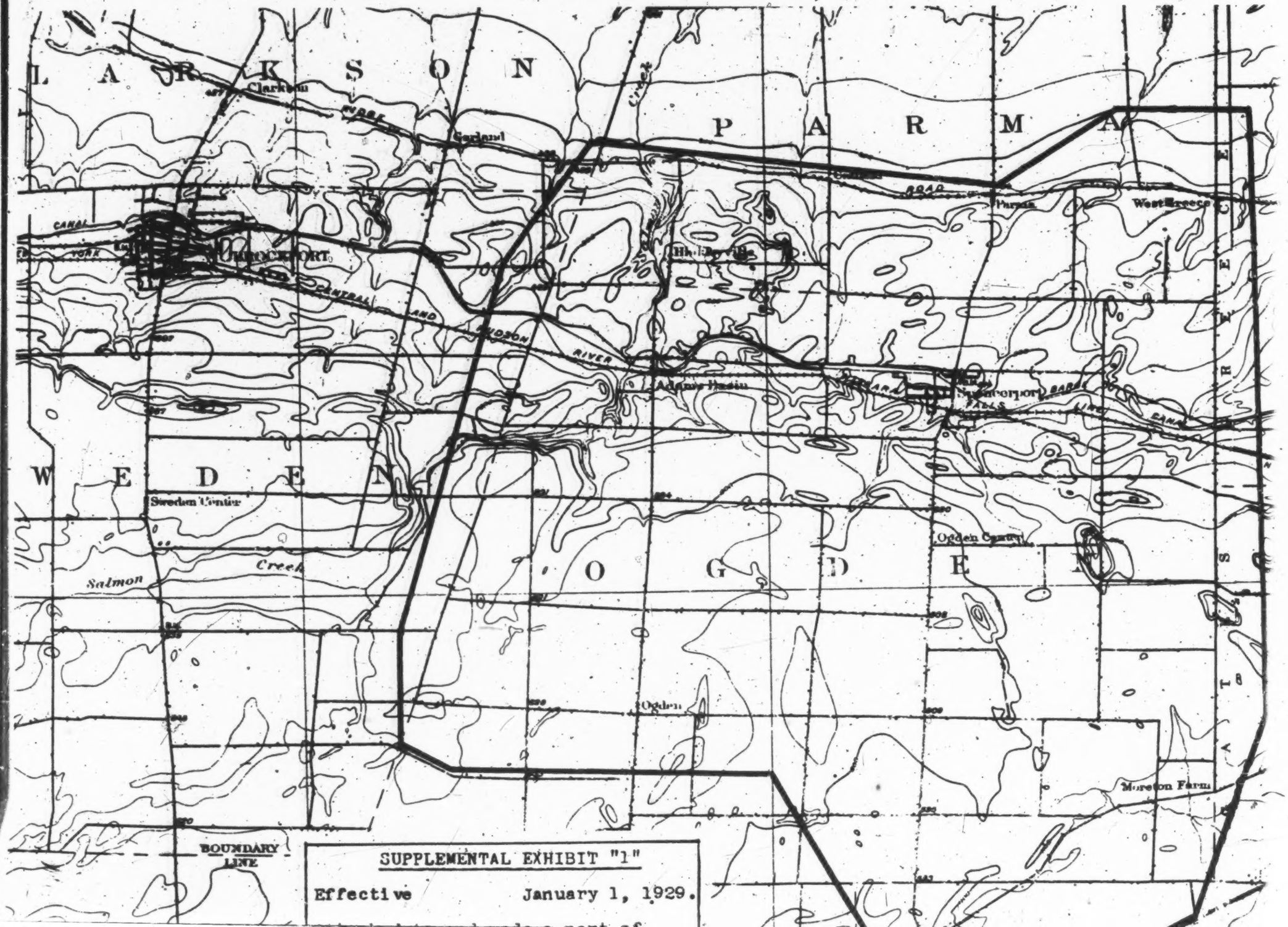
Attest
Witness:

ACCEPTED:
ROCHESTER TELEPHONE CORPORATION

(Sgd.) W. J. O'Hea
Secretary

By (Sgd.) J. P. Boylan, Pres.

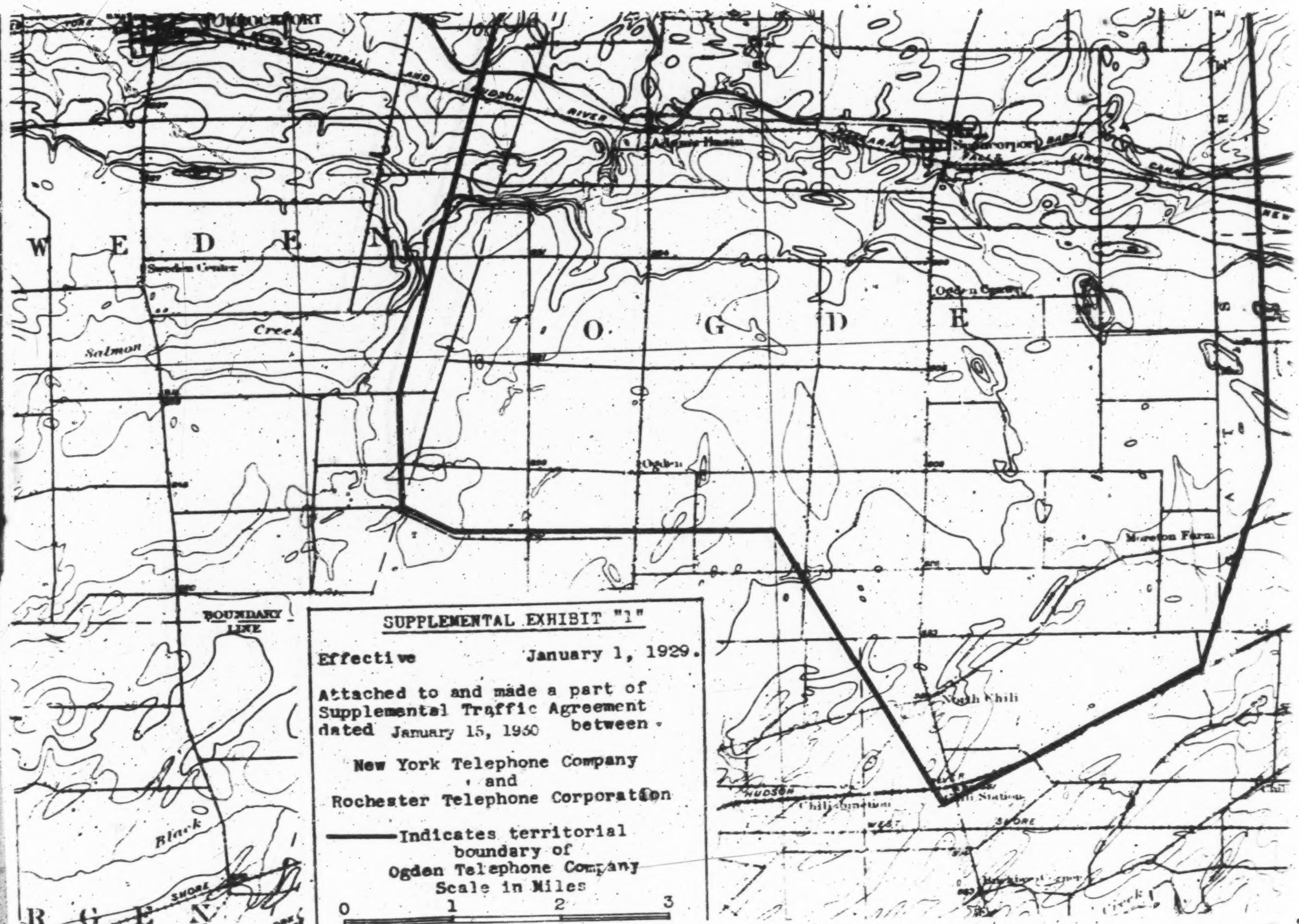
(Seal)



SUPPLEMENTAL EXHIBIT "1"

Effective January 1, 1929.

416
M
A
G
B
West Greece
South Greece
NEW YORK CENTRAL
G
A
Morton Farm
Little



SUPPLEMENTAL EXHIBIT "1"

Effective January 1, 1929.

Attached to and made a part of Supplemental Traffic Agreement dated January 15, 1950 between

New York Telephone Company
and
Rochester Telephone Corporation

——— Indicates territorial boundary of Ogden Telephone Company

Scale in Miles

0 1 2 3

A T B I R Z Z
G A

SUPPLEMENTAL TRAFFIC AGREEMENT
Indirect Connecting Company

417

Effective January 1, , 19 29

Under the provisions of Traffic Agreement effective the 1st day of January , 19 29, between NEW YORK TELEPHONE COMPANY (therein described as BELL COMPANY) and ROCHESTER TELEPHONE CORPORATION (therein described as CONNECTING COMPANY), consent is hereby given by BELL COMPANY to the connection of its lines and system with the telephone system operated by the Seneca-Corham Telephone Company (hereinafter referred to as INDIRECT CONNECTING COMPANY) within the territory shown on the map attached hereto and marked Supplemental Exhibit "1," subject, however, to the following terms and conditions:

1. Such connection shall be made through the system of CONNECTING COMPANY and the arrangements therefor shall be such as may be from time to time agreed upon between CONNECTNECTING COMPANY and INDIRECT CONNECTING COMPANY.
2. For the purpose of settlement between BELL COMPANY and CONNECTING COMPANY, under the terms and conditions of said Traffic Agreement, the system of INDIRECT CONNECTING COMPANY shall be deemed to be part of the system of CONNECTING COMPANY.
3. The consent hereby given shall not be deemed to be a waiver of any of the terms and conditions of said Traffic Agreement, and all the terms and conditions thereof, except as herein specifically amended or modified, shall continue in full force and effect and shall apply hereto in all respects as if the same had been specifically set out.
4. The consent hereby given shall be without prejudice to the right of BELL COMPANY, whenever in its opinion such a course may appear desirable, to make other arrangements for the connection of its lines with the system of INDIRECT CONNECTING COMPANY.
5. These arrangements may be terminated at any time by thirty (30) days' written notice given by one company to the other and shall be terminated by the expiration or termination of said Traffic Agreement.

Dated this 15th day of January , 19 30.

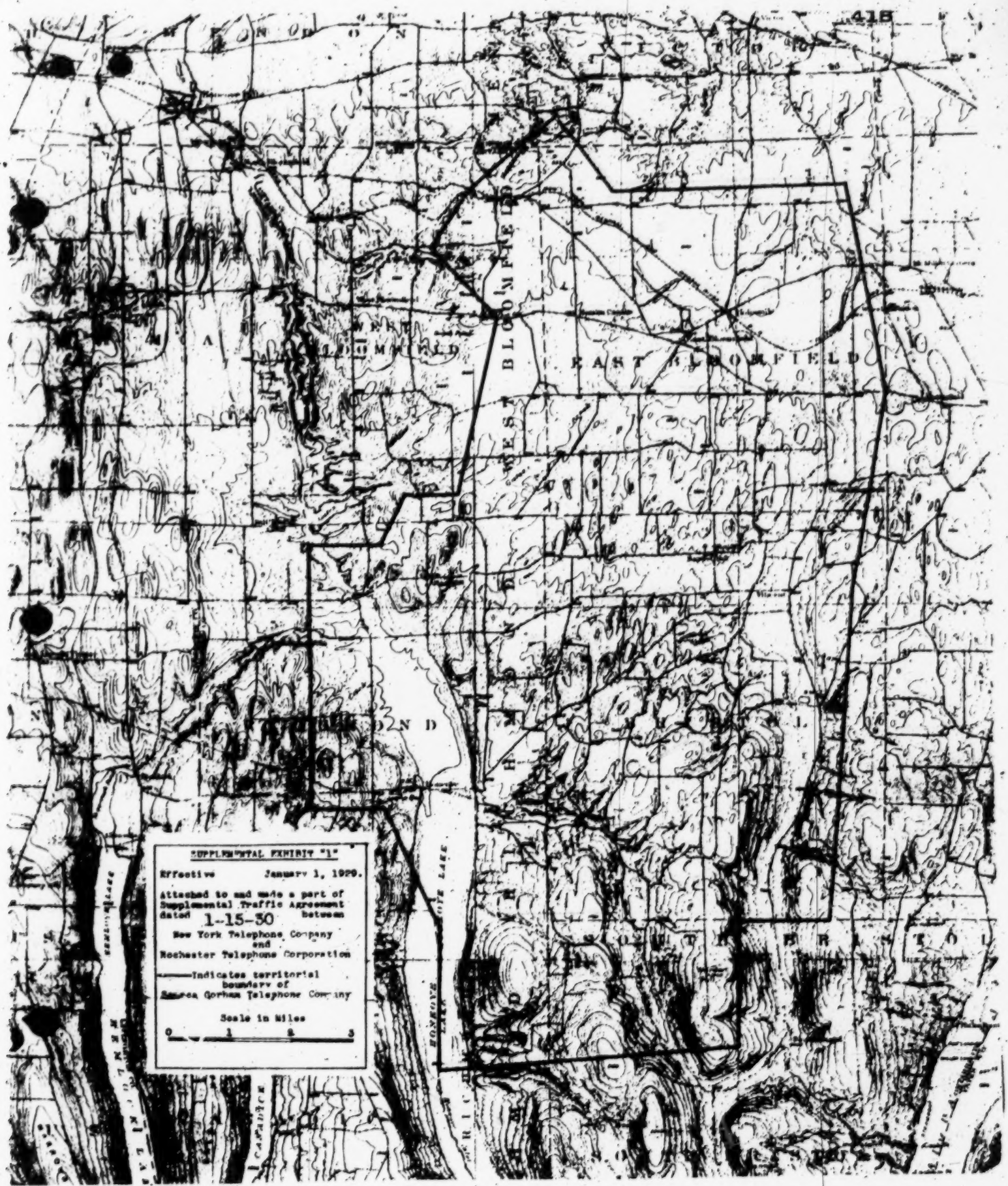
Witness: NEW YORK TELEPHONE COMPANY

(Sgd.) R. A. Curtaugh By (Sgd.) James W. Hubbell

ACCEPTED:

Attest
Witness: ROCHESTER TELEPHONE CORPORATION

(Sgd.) W. J. O'Hea By (Sgd.) J. P. Boylan, Pres.
Secretary


415
EAST BLOOMFIELD
SUPPLEMENTAL EXHIBIT "1"
Effective January 1, 1929.
Attached to and made a part of Supplemental Traffic Agreement dated 1-15-30 between
New York Telephone Company
and
Rochester Telephone Corporation
——Indicates territorial boundary of
Seneca Gorham Telephone Company
Scale in Miles
0 1 2 3

COMMISSION'S EXHIBIT "B"

THIS AGREEMENT, made and entered into this First day of January ,1925, by and between the NEW YORK TELEPHONE COMPANY (hereinafter referred to as the New York Company), and the ROCHESTER TELEPHONE CORPORATION (hereinafter referred to as the Rochester Corporation), both corporations of the State of New York, WITNESSETH:

WHEREAS, the New York Company and the Rochester Corporation each now operates and maintains certain telephone facilities in the Counties of Monroe, Genesee, Ontario, Livingston, Wyoming, Allegany, Steuben and Yates, State of New York, certain of which telephone facilities of the Rochester Corporation were heretofore, and on or about August 1, 1921, conveyed to it by the New York Company, and it is deemed by the parties hereto to be to their mutual interest, in the economical conduct of their public undertaking, to enter into this agreement;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties hereto covenant and agree as follows:

FIRST: This agreement relates to and includes the letting of facilities, the rendering of the services, and the granting of the rights or privileges, in the territory aforesaid, set forth in the several schedules comprising "Appendix A", hereto annexed and made part hereof, for and in connection with the conduct of the public undertaking of the respective parties hereto, it being understood and agreed that the New York Company may extend to, or exercise on behalf of, the American Telephone and Telegraph Company, the benefit and rights accruing under this agreement. It does not relate to nor include facilities, services or rights or privileges for any other purpose, nor does it affect any arrangements for the division of revenue on any joint business.

SECOND: Such letting, rendering and granting (which, for convenience, are hereinafter referred to as "letting", and the exercising, taking or accepting thereof are hereinafter referred to as "hiring") of such facilities, services, and rights or privileges (which, for convenience, are hereinafter referred to as "facilities") shall be at the rates, or on the basis, of compensation set forth in "Appendix A", payable monthly, on or before the 15th day of the month following that for which the charge accrues, and shall be subject to the reasonable rules, regulations and practices of the party letting such facilities, and upon and subject to the terms and conditions hereinafter contained.

THIRD: A party hereto desiring to hire facilities hereunder from the other, shall make written application therefor, and, if, in the judgment of the other, it has or can reasonably make available facilities for that purpose, it shall accept such application. The application and acceptance may be in such form, or evidenced in such manner, as may be the customary practice of the parties or as they may otherwise determine.

FOURTH: The letting company shall maintain the facilities let by it in good and serviceable order and condition, without cost or expense to the hiring company except as otherwise provided in Schedule V of Appendix A hereto annexed.

FIFTH: The failure of either party hereto to comply with, or to enforce or insist upon compliance by the other party with any of the terms and conditions of this agreement or the waiver by either party hereto of the same in any instance or instances shall not be construed as a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect. 420

No assertion shall be made by either party hereto of a breach of any provision of this agreement by the other unless a notice in writing of such breach shall have first been given to the other party at its principal office, within ten days following such breach, if any, except as hereinabove otherwise expressly provided.

SIXTH: Neither this agreement, nor any of the rights or benefits hereunder, shall be transferable or assigned by either party hereto without the consent in writing of the other and any attempted transfer or assignment without such written consent of the other party shall be void and of no effect.

SEVENTH: The rights and obligations of hiring and letting facilities pursuant to the terms and conditions of this agreement shall continue in full force and effect until the first day of January 1926, and thereafter until the expiration of one year after notice in writing has been given by either party to the other that it will not thereafter let or hire any further facilities hereunder, it being expressly understood and agreed that any letting or hiring theretofore made hereunder shall be in no wise affected thereby. Except as may, in any instance or instances, be otherwise expressly agreed upon by the parties, any letting or hiring effected hereunder may be terminated by either party after the expiration of thirty (30) days after notice in writing has been given by one party to the other of its desire to terminate such letting and hiring.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate, and their respective

corporate seals to be affixed hereto by their respective officers thereunto duly authorized, on the day and year first above written.

NEW YORK TELEPHONE COMPANY

by

General Manager.

Attest:

Asst Secretary

ROCHESTER TELEPHONE CORPORATION

by

Attest:

Asst Secretary

APPENDIX "A" TO AGREEMENT

Schedule I - Attachments

(a) Open wire, per touch, per annum	.13
(b) Aerial cable, per touch, per annum	1.30

Schedule II - Aerial Wire

Charges to be computed on a cumulative mileage basis for each gauge and type of circuit using actual mileages to .1 of a mile.

	Per Ckt. Mile Per Annum
(1) For phantom, side or physical circuit	
.104 (#12 AWG) copper - non-loaded, per circuit mile, per annum	$27.50
.080 (#14 AWG) copper-non-loaded, per circuit mile, per annum	27.50
.109 (#12 AWG) iron-per circuit mile, per annum	15.00
(2) For use of a physical circuit solely for the purpose of creating a phantom circuit	
.104 (#12 AWG) copper - per circuit mile, per annum	13.75
.080 (#14 AWG) copper - per circuit mile, per annum	13.75

Schedule III - Cable Conductors - (including allowance for terminating conductors on main distributing frames)

Charges to be computed on a cumulative mileage basis for each gauge and type of circuit using actual mileage to .1 of a mile.

Physical, Phantom and Side Circuits

	Non-Quadded Pairs		Quadded Pairs	
	Charges per pair mile		Charges per pair mile	
Aerial	Non-Loaded	Loaded	Non Loaded	Loaded
#22	$1.80	$10.10	$4.80	$ 7.70
#19	13.00	15.90	8.70	11.60
#16	24.80	27.70	16.80	19.60
#14	36.90	41.80	25.90	28.80
#13	46.80	54.10	32.20	36.00
#10	95.80	101.10	65.60	69.40

	Non-Quadded Pairs Charges per pair mile		Quadded Pairs Charges per pair mile	
Underground	Non-Loaded	Loaded	Non-Loaded	Loaded
#22	$6.50	$ 8.40	$ 5.70	$ 6.60
#20	7.90	10.80	5.30	8.20
#19	9.50	12.40	6.30	9.20
#16	17.50	20.40	11.70	14.60
#14	27.10	30.00	18.10	21.00
#12	33.50	39.30	22.40	28.20
#10	65.50	71.30	43.80	49.60

Schedule IV - Morse and similar D.C. Channels

Single Conductor for use as a D.C. Channel for Morse or similar purposes, per mile per annum $6.00

Schedule V - Subway Ducts

Per duct foot, per annum $ .10

Schedule VI - Cable Facilities initially Provided for the Use of Both Parties

Whenever both parties require additional cable facilities and the simultaneous provision of common facilities proves economical in the opinion of the Engineering Departments of both companies, one of the parties as determined by mutual agreement will at its own cost and expense provide the facilities required by both parties and will reserve for and let to the other party such facilities as the latter may require, such facilities to be let in accordance with the following rates and conditions:

(a) If the letting party provides cable facilities for its own immediate use and for the immediate or subsequent use of the hiring party, the hiring party shall pay to the letting party a proportionate part of the annual carrying charges on the entire cable, in the proportion which the cross-sectional area of the conductors reserved for the use of the hiring party bears to the cross-sectional area of all the conductors in the cable.

(b) If the letting party provides cable facilities for the immediate use of the hiring party and for its own subsequent use at a date agreed upon by both parties, the hiring party shall pay to the letting party the annual charges on the entire cable until the date agreed upon, and after such date a proportionate part of the carrying charges as provided in (a) above.

(c) The annual carrying charges contemplated in Sections (a) and (b) of this Schedule shall be computed as follows:

1. For Aerial Cable, 20% of the book cost of the cable in place, plus a charge of $1.30 per touch per annum for supporting said cable on poles.
2. For underground Cable, 14.1% of the book cost of the cable in place plus a charge of 10¢ per duct foot per annum for the space in underground conduit occupied by said cable.

(d) Whenever it is necessary by reason of changes in street grade or the requirements of municipal or other governmental authority, to relocate or reconstruct the facilities provided for in this schedule, the hiring party shall further pay to the letting party such proportion of the total expense (exclusive of the cost of additions or betterments to plant) incurred by the latter in effecting such relocation or reconstruction as the cross-sectional area of the conductors reserved for the use of the former bears to the cross-sectional area of all the conductors in the cable.

(e) Each supplemental agreement covering facilities provided for in this schedule shall continue in full force and effect until terminated by one year's written notice by either party to the other and, in the event of such termination, any losses occasioned thereby will be adjusted by mutual agreement between the parties hereto or by a Board of Arbitrators appointed by the parties hereto.

Schedule VII - Phantom and Composite Sets, Composite Ringers and Simplex Sets -

Composite Sets	- each,	per	annum		$24.00
Composite Ringers	- "	"	"		24.48
Phantom Sets	- "	"	"		10.80
Simplex Sets	- "	"	"		5.40

Schedule VIII - Jacks in Toll Test Boards -

Jacks and associated wiring-each, per annum 1.08

Schedule IX - Battery Power and Ringing Current.

Annual Rental Rates and Charges for electrical current supplied by Rochester Corporation to Rochester Toll and Test Boards and composite sets of the New York Company for telephone transmission and signalling -

Electrical current for telephone transmission - per annum	$2126.00
or Optional Schedule if and when an approved meter is installed - per Kilowatt Hour	.35
Electrical current for signalling (Ringing Current) - per annum	250.00

Schedule X - Switching and Recording Trunks and Call Circuits -

The New York Company will pay the Rochester Corporation a proportionate part of the annual carrying charges on all Switching and Recording Trunks and Call Circuits between the Rochester Toll Board and Central Offices of the Rochester Exchange not in the same building with the Toll Board, the proportion to be based on the relative usage of these facilities for joint toll business as compared with the total usage of the facilities

as determined by periodic studies. Until a redetermination is made, the New York Company will pay 64.5% of the above mentioned annual carrying charges and the carrying charges will be determined by applying the rates shown in Schedules II and III.

Schedule XI - Service Charges for Checking and Switching -

(a) For switching and checking messages which both originate and terminate at stations of the Rochester Corporation and which are switched or checked at the Rochester Toll Board, the Rochester Corporation will pay the New York Company a proportionate part of the cost of operating said Toll Board based on the facilities and services involved as determined by periodic studies, such payment to be expressed as a rate per each message which originates at a Rochester Exchange station, terminates at an exchange of the Rochester Corporation and is switched or checked at the Rochester Toll Board. Until a redetermination is made, the amount which the Rochester Corporation will pay for these facilities and services will be at the rate of $.159 per message.

(b) For switching and checking New York Company toll messages not passing over the lines of the Rochester Corporation by the Rochester Corporation at its Toll Boards at the Dansville, Naples, Warsaw, Cohocton and LeRoy Central Offices of the Rochester Corporation, the New York Company will pay monthly to the Rochester Corporation an amount equivalent to the cost of handling such messages, as determined from the application of the unit costs of the New York Company; such payments until modified or changed by the New York Company, to be as follows:

Dansville-	per month	$7.28
Naples -	" "	.69
Warsaw -	" "	13.97
Cohocton -	" "	5.77
LeRoy -	" "	.70

Schedule XII - Maintenance and Toll Testing -

Upon the request of either party, the other party will if practicable undertake the work of maintenance or toll testing for the former and the former will pay for such work the actual cost thereof plus a reasonable supervisory charge.

COPY TO MR. KILLIGH:

As per your request.

Frank T. Byrne,
Commercial Supt.

B:M
4/11/33.

April 11th, 1933.

Mr. P. C. Calliven,
Division Commercial Agent,
New York Telephone Company,
Buffalo, N.Y.

Dear Mr. Calliven:

We have reviewed the study of message switched at Geneseo and Warsaw and are agreeable to the change in charges to be billed to your company, from $20.41 per month to $9.10 per month.

We understand that this change is to be effective as of October 1st, 1932.

Yours very truly,

Frank T. Byrne,
Commercial Supt.

B:M

NEW YORK TELEPHONE COMPANY

158 STATE STREET

ALBANY, N. Y.

TELEPHONE

JAMES W HUBBELL
VICE PRESIDENT AND GENERAL MANAGER

March 17, 1933.

Mr. J. P. Boylan, President and General Manager,
Rochester Telephone Corporation,
Rochester, New York.

Dear Mr. Boylan:

The New York Telephone Company agrees that it will perform the ticketing and operating work necessary at the Rochester toll and tandem boards for the Rochester Corporation's internal toll traffic under the following schedule of compensation:

Per message ticketed at the toll board	$.2408
Per message ticketed at the Rochester "A" board	.0250
For tandem equipment and floor space, monthly rental of -	$380.93

This schedule of payments is in accordance with the study made in conformance with the memorandum of May 23, 1932, forwarded to you under date of January 27, 1933.

Very truly yours,

J. W. Hubbell

Accepted for Rochester Telephone Corporation

J. P. Boylan

President and General Manager.

[redacted]

428

293

Copy to Mr. Welch 11/1/32

24
34
41

Buffalo, October 31 1932

Mr. Frank T. Byrne, Coml.Supt.,
Rochester Telephone Corp.,
Lincoln Alliance Bldg.,
183 Main St.,E, Rochester, N.Y.

Dear Mr. Byrne:

In accordance with the terms of our present agreement, we are paying the Rochester Telephone Corporation $28.11 per month for through switching.

Attached is a summary showing the results of a study made during August to determine the proper monthly amount that should be paid for the switching performed by the Rochester Corporation. This study indicates that such an amount is $30.10 per month.

Will you please review the attached and advise me whether the study is satisfactory to the Rochester Corporation and if so I shall arrange to make future payments on the new basis effective October 1st.

I shall be glad to secure any additional information that you may desire on the above.

29.12
19.2
115.80

Yours truly,

P.C. Gallivan
Division Commercial Agent

Hold for general prorate & switching plan.

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STUDY TO DETERMINE MONTHLY AMOUNT DUE THE ROCHESTER TELEPHONE CORPORATION FOR THROUGH SWITCHING PERFORMED ON NEW YORK TELEPHONE COMPANY TRAFFIC

TOTAL MESSAGES SWITCHED BY THE ROCHESTER TELEPHONE CORPORATION FOR THE NEW YORK TELEPHONE COMPANY DURING THE MONTH OF AUGUST 1931

(COMPUTED FROM TOLL LINE ENGINEERING RECORDS)

MESSAGES SWITCHED AT GENESEO

Batavia to and from Hornell	193

MESSAGES SWITCHED AT WARSAW

Arcade to and from Batavia	272
Batavia to and from Coudersport, Pa.	35
" " " " Eldred, Pa.	6
" " " " Emporium, Pa.	6
" " " " Port Allegany, Pa.	6

TOTAL MESSAGES SWITCHED BY THE ROCHESTER TELEPHONE CORPORATION

A.	I & II	518
B.	Ratio of average month traffic to August traffic (determined from analysis of toll messages originated by Batavia for the year 1931)	.83
C.	Estimated average month messages switched for the New York Company (A x B)	430
D.	Estimated cost per message switched at common battery boards of more than three positions	$.0211
E.	Amount due connecting company per month (C x D)	$9.10

430

[fol. 431] RESPONDENT'S EXHIBIT 1

Dec. 19, 1913.

"The Attorney General, Washington, D. C.

SIR:

"Wishing to put their affairs beyond criticism and in compliance with your suggestions, formulated as a result of a number of interviews between us during the last sixty days, the American Telephone & Telegraph Company and other companies in what is known as the Bell system, have determined upon the following course of action:

"First. The American Telephone & Telegraph Company will dispose promptly of its holdings of stock of the Western Union Telegraph Company in such way that the control and management of the latter will be entirely independent of the former and of any other company in the Bell system.

"Second. Neither the American Telephone & Telegraph Company nor any other company in the Bell system will hereafter acquire, directly or indirectly, through purchase of its physical property or of its securities, or otherwise exercise dominion or control over any other telephone company owning, controlling or operating any exchange or line which is or may be operated in competition with any exchange or line included in the Bell system or which constitutes or may constitute a line or portion of any system so operated or which may be so operated in competition with any exchange or line included in the Bell system.

"Provided, however, that where control of the properties or securities of any other telephone company heretofore has been acquired and is now held by or in the interest of any company in the Bell system and no physical union or consolidation has been affected, or where binding obligations for the acquisition of the properties or securities of any other telephone company heretofore have been entered into by or in the interest of any company in the Bell system and no physical union or consolidation has been effected, the [fol. 432] question as to the course to be pursued in such cases will be submitted to your department and to the Interstate Commerce Commission for such advice and directions, if any, as either may think proper to give, due regard being

had to public convenience and to the rulings of the local tribunals.

"Third. Arrangements will be made promptly under which all other telephone companies may secure for their subscribers toll service over the lines of the companies in the Bell system in the ways and under the conditions following:

(1) Where an Independent company desires connection with the toll lines of the Bell system, it may secure such connection by supplying standard trunk lines between its exchanges and the toll board of the nearest exchange of the Bell operating company.

(2) When the physical connection has been made by means of standard trunk lines, the employes of the Bell system will make the toll line connections desired but in order to render efficient service, it will be necessary that the entire toll circuit involved in establishing the connection shall be operated by and under the control of the employes of the Bell system.

(3) Under the conditions outlined above, any subscriber of an Independent company will be given connection with any subscriber of any company in the Bell system or with any subscriber of any Independent company with which the Bell system is connected, who is served by an exchange which is more than fifty miles distant from the exchange in which the call originates.

(4) The subscribers of the Independent company having toll connections described above shall pay for such connections the regular toll charge of the Bell company and in addition thereto, except as hereinafter provided, a connection charge of ten cents for each message which originates on its [fol. 433] lines and is carried in whole or in part, over the lines of the Bell system. The charges incident to such service shall be made by the Bell company against the Independent company whose subscriber makes the call and such charges shall be accepted by the Independent company as legal and just claims.

(5) Under this arrangement, the lines of the Bell system shall be used for the entire distance between the two exchanges thus connected provided the Bell system has lines connecting the two exchanges. Where the Bell system has

no such lines, arrangements can be made for connecting the lines of the Bell system with the lines of some Independent company in order to make up the circuit, but such connections will not be made where the Bell system has a through circuit between the two exchanges.

(6) Any business of the kind commonly known and described as "long lines" business, offered for transmission over the lines of the American Telephone & Telegraph Company, shall be accepted for any distance; that is, on such "long lines" business calls shall be accepted where the point of destination is less than fifty miles from the exchange where the call originates as well as where the point of destination is greater than fifty miles therefrom.

(7) Any business of the kind commonly known as "long lines" business offered for transmission over the lines of the American Telephone & Telegraph Company shall be accepted at the regular toll rates and no connecting charge shall be required. But such calls shall be handled under the same operating rules and conditions as apply to calls over the local toll lines.

Very Respectfully Yours, (Signed) N. C. Kingsbury,
Vice President."

[fol. 434] RESPONDENT'S EXHIBIT 2

November 9, 1917.

Hon. The Attorney General, Department of Justice, Washington, D. C.

SIR:

I wish to submit herewith for your consideration a series of proposed purchases and sales which have for their purpose the consolidating of telephone exchanges located in the western portion of New York State.

The principal places involved are Buffalo, Rochester and Jamestown. Besides these principal cities there are numerous small exchanges commercially tributary to these three large centers.

In brief the plan is:

1. That the Federal Telephone and Telegraph Company (Independent), doing business in and about Buffalo, shall

sell its exchange properties in Buffalo and vicinity to the New York Telephone Company (Bell).

2. That the Rochester Telephone Company (Independent) and the New York Telephone Company (Bell) shall both sell their exchanges in Rochester and vicinity to a new company which is to be organized, managed and controlled by local Rochester men and known as the Rochester Telephone Corporation or by some similar name (Independent).

3. That the Home Telephone Company (Independent) and the New York Telephone Company (Bell) shall both sell their exchanges in Jamestown and vicinity to a new company which is to be organized, managed and controlled by local Jamestown men and known as the Jamestown Telephone Corporation or by some similar name (Independent).

Accompanying this letter are two maps showing the [fol. 435] territory affected—No. 1 showing the present status of the territory so far as competition is concerned, and No. 2 showing the status of the same territory after the proposed plan outlined herein is carried out.

We are also submitting herewith a binder containing several documents to which we wish to call your special attention. The binder is properly indexed for ready reference. It includes the following documents:

(a) An outline of the unsatisfactory telephone conditions now existing in Western New York, and a plan for remedying them. This statement is made by all four of the principal companies affected, and an original signed copy thereof is also enclosed.

(b) A resolution of the Western Pennsylvania Independent Telephone Association, representing all directly affected Independent telephone companies, endorsing the proposed plan.

(c) Memorandum in support of application to the Attorney General of the United States for approval of the proposed plan for the exchange of telephone properties in Western New York State. This memorandum was prepared by the attorneys representing the Federal Telephone and Telegraph Company.

(d) Memorandum of origin and progress of the trend of public opinion in Buffalo on the consolidation of the two telephone systems operating there.

(e)-(q), inc. Clippings from various newspapers, reports and resolutions of City Councils, copies of audits, and various other statements and data referring to the plan.

We are also submitting herewith an agreement between the Federal Telephone and Telegraph Company and Burt G. Hubbell as parties of the first part, and the New York Telephone Company as party of the second part, dated April 15, 1916, which sets forth in detail the terms of the proposed purchase of the Federal Company's property by the New York Telephone Company. This agreement, which has been executed by both parties, you will note upon examination is in the nature of an option to the New York Company for the purchase of this property upon the compliance by the Federal Company and Mr. Hubbell with certain conditions precedent which are set forth in detail in the document itself.

[fol. 436] We are also submitting herewith a proposed agreement between George R. Fuller and other Rochester men connected with the Independent telephone business as parties of the first part, the Rochester Telephone Company as party of the second part, and the New York Telephone Company as party of the third part. This agreement is not executed. You will note that this agreement contemplates the incorporation of a new company and the taking over by that new company of the physical property of the present Rochester Telephone Company (Independent) and of the New York Telephone Company located in the city of Rochester and vicinity. Accompanying this agreement is a proposed agreement to be supplemental thereto, between George R. Fuller and the other parties of the first part and the New York Telephone Company, which provides the method by which the Rochester parties may acquire their portion of the common stock of the new company.

We are also submitting herewith a proposed agreement between John H. Wright, party of the first part, the Home Telephone Company of Jamestown, New York, as party of the second part, and the New York Telephone Company, party of the third part. This agreement is not yet executed. You will note that this agreement contemplates the incorporation of a new company and the taking over by that new company of the physical property of the present Home Telephone Company of Jamestown (Independent) and of

the New York Telephone Company located in the city of Jamestown and vicinity.

You will note that the contracts with the Rochester Company and with the Jamestown Company are conditioned upon the carrying out of the terms of the contract with the Federal Company, and that the contract with the Federal Company, and all these contracts, are conditioned upon the securing of the approval of the Department of Justice to the plan.

[fol. 437] The combined result of these purchases and sales would be to relieve the people in the territory affected of the burden of extra expense incident to telephone duplication.

The plan contemplates the acquisition by the New York Telephone Company (Bell) of approximately 32,570 exclusive telephone stations, and the acquisition by the two Independent companies of 35,895 exclusive Bell telephone stations, thus reducing the comparative number of stations owned by the New York (Bell) Company by approximately 3,300, and at the same time there will be eliminated in the territory affected approximately 15,300 duplicate stations. With respect to toll or long distance service, all of the telephone users within the territory affected will have full toll connections with both the Independent and Bell systems, which means that whereas today there is available to Independent toll lines in this territory connection with only 87,963 stations, under the changed conditions provided for in the plan, all Independent subscribers will have connection with some 235,588 stations in this territory.

I wish further to call your attention to the fact that no interstate connections are disturbed in any way, except that such interstate connections as are now available to Independent telephone subscribers are extended to the extent that such subscribers have connections with all the telephones within the affected territory in accordance with the figures given above. So that the result is that not only is there no cutting down of Independent toll connections, either intrastate or interstate, but on the contrary the number of such connections is increased many times.

With respect to physical property, we might call attention to the fact that no property which does not lie wholly [fol. 438] within the State of New York will be affected by these transactions.

There is one special reason which appeals very strongly to us at this time in respect to this matter, and that is the

national necessity of conserving materials, labor, and capital, all of which are being to a large extent wasted in this duplication of telephone effort.

With the submission of the documents described above, we ask for your consideration of this matter, calling attention to one further fact, that under the terms of the resolution of the Council of the City of Buffalo permitting the consolidation, the period fixed by such permission will expire in March, 1918.

Very respectfully submitted, N. C. Kingsbury, Vice President.

Enclosure.

[fol. 439] RESPONDENT'S EXHIBIT 3

Outline of the Unsatisfactory Telephone Conditions Now Existing in Western New York and a Plan for Remedying Them.

Present Telephone Conditions

Previously to 1900 the public demand for telephone service had not developed sufficiently to induce the construction of Independent telephone systems in Western New York. During the period from 1900 to about 1909 occurred a great increase in this demand, which brought into existence a considerable number of Independent telephone companies throughout that territory. This period marked an abnormal extension of telephone service with a corresponding increase of construction which taxed the abilities of both the Bell and Independent companies. Since that time such increase as has occurred has been the result only of natural growth.

The tendency of the public is to patronize the company with the larger number of subscribers. This has led to a division of telephone service in each competitive district as a result of which one of the two competing companies has usually acquired a great predominance of subscribers. In some cases the predominating exchange became Bell, and in others, Independent. This naturally led to the isolation of the districts served by one company, from those served by the other, with the result that large sections of the community are practically unable to communicate with each other by telephone.

The public inconvenience caused by this condition resulted in elimination and coalition of the various systems until fully two-thirds of the localities in New York State, which once had competition, are now served by a single system, leaving, practically speaking, only western New York with this divided service.

In an effort to improve this situation various conferences have been held between representatives of the different telephone companies serving western New York, the result of [fol. 240] which is set forth in the proposed plan which follows:

Plan for Adjustment

In view of the fact that telephone business centers its greatest activity within a commercial district supplied by some important city and that satisfactory service to the public must provide rapid and adequate communication for all subscribers within such a district, the cities of Buffalo, Rochester and Jamestown (the most important in western New York) were recognized as the natural centers of different telephone areas. Investigation showed that the Independent company in Jamestown had slightly more subscribers than the Bell company in that city; that the Independent and Bell companies in Rochester had approximately the same number of subscribers; and that in Buffalo the Bell company had a very much larger number of subscribers than the Independent company. As the result of this condition, it was determined that the companies to serve the Rochester and Jamestown districts should be Independent companies, while in the case of Buffalo, the company should be the New York (Bell) company.

In order to facilitate the necessary financing of the new Independent corporations in the Rochester and Jamestown districts without the burden of large bond issues at the outset, the Bell company agreed to turn over its properties within those districts in exchange mainly for preferred stock in the new corporations. This stock is to have no voting power in the election of directors so that the Bell company will have but a minority representation upon the board of directors unless, after a period of years, the local management has been unable to earn and distribute five per cent. (5%) upon this stock. The amount of stock so to be issued to the Bell company will in no event exceed the fair and reasonable value of the Bell company's property conveyed to the new corporation.

Upon this basis, contracts embodying the proposed plan have been tentatively agreed upon, which provide in brief——

[fol. 441] 1. That in Rochester and its tributary districts both the Bell and Independent companies shall sell all of their exchange plants to a new Independent telephone corporation to be organized, that corporation to be known as the Rochester Telephone Corporation. In it the Bell company to have not to exceed one-third of the common voting stock.

2. That in Jamestown and its tributary districts both the Bell and Independent company shall sell all of their exchange plants to a new Independent corporation to be organized, that corporation to be known as the Jamestown Telephone Corporation. In it the Bell company shall have not to exceed one-third of the common voting stock.

3. That the telephone system of the Federal Telephone and Telegraph Company, of Buffalo, with its tributary districts, shall be consolidated with the New York Telephone Company.

4. That all Independent telephone companies within the area affected, which for any reason do not enter into the proposed plan, shall be given telephone connections with the unified system, as proposed, so that all of their subscribers shall have connection with all of the subscribers of the unified system.

5. That all existing toll lines of Independent companies, crossing the state line between the State of New York and the State of Pennsylvania, shall remain in the ownership of Independent telephone companies.

6. That all toll lines in the district shall be so operated as to accord to all subscribers of either telephone connection with all the subscribers of both.

7. That all interstate long distance business heretofore accorded the Independent companies of other states shall be preserved and that all such companies shall in addition thereto be accorded connection with all the subscribers of both Bell and Independent companies within the area affected.

8. That such plan does not involve the transfer either to or from the Bell system or the Independent companies of

any property not located wholly within the State of New York.

The Results of the Plan

This plan involves the transfer to the Bell company of approximately 32,570 exclusive telephones from Independent companies. It likewise involves the transfer to the Independent companies by the Bell company of approximately 35,895 exclusive telephones. There is submitted herewith a statement showing in detail the numbers of telephones so transferred or taken over in each of the localities within the district affected. The result is a division of the telephone subscribers throughout western New York between the Bell system and Independent companies, which is as [fol. 442] equitable as it is possible to make it.

The plan further accords to all telephone users within this area all the connections of both systems (including local and long distance service). It likewise preserves the integrity of Independent telephone connections over both interstate and intrastate toll lines, and enhances the value of these telephone connections through the enlarged number of connections afforded. Whereas today there are available to Independent lines in western New York 87,963 stations, under the changed condition proposed there will be available 235,388 stations in such area.

Maps have been prepared illustrating the present telephone condition in western New York and the condition which will exist upon the consummation of the proposed plan. These indicate that the plan involves turning over to Independent control a substantial part of the territory of the Bell company in western New York.

All contracts tentatively entered into in furtherance of this plan are expressly contingent upon the approval of the Attorney-General of the United States, and so far as required by law of the Public Service Commission of the State of New York and of the various municipalities affected. Further, a preponderance of public sentiment in favor of the plan must be secured throughout the areas affected.

Federal Telephone and Telegraph Company, by (Sd.) B. G. Hubbell, Prest. (Sd.) George R. Fuller, For Himself and Associates. Home Telephone Company of Jamestown, by (Sd.) John H. Wright, Secretary. New York Telephone Company by (Sd.) F. H. Bethell, Vice President.

October 5, 1917.

[fol. 443] RESPONDENT'S EXHIBIT 4

This Agreement, made and entered into at the City of Rochester, N. Y., this twenty-fifth day of February, one thousand nine hundred and eighteen, by and between George R. Fuller, W. Roy McCanne and Frederick W. Zoller, all of the City of Rochester, N. Y., parties of the first part (hereinafter collectively referred to as the Individual Parties), the Rochester Telephone Company, a corporation of the State of New York, having its principal office at 59 Stone Street, in the City of Rochester, N. Y., party of the second part (hereinafter referred to as the Rochester Company), and the New York Telephone Company, a corporation of the State of New York, having its principal office at 15 Dey Street, Borough of Manhattan, The City of New York, N. Y., party of the third part (hereinafter referred to as the New York Company), Witnesseth:

That in consideration of the sum of one dollar ($1.00), lawful money of the United States, and other valuable considerations, paid by each of the parties hereto to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, each of the parties of the first part hereby, for himself, his heirs, executors, administrators and assigns, and each of the other parties for itself, its successors and assigns, covenants and agrees, as follows:

First. The Individual Parties shall duly incorporate or cause to be incorporated a telephone and telegraph corporation (for convenience hereinafter sometimes referred to as the New Corporation), pursuant to the provisions of Article IX of the Transportation Corporations Law of the State of New York, or such other law or laws as may, at the time of such incorporation, be appropriate for the incorporation of such a corporation intending to conduct such business in the State of New York.

The New Corporation shall bear the name "Rochester [fol. 444] Telephone Corporation", or, if said name is not lawfully available, such other name as the Rochester Company and the New York Company may designate.

The general route or routes of the lines of telegraph and telephone of the New Corporation (which shall be sufficiently comprehensive to include and cover all the municipal subdivisions within which any of the telephone and telegraph lines to be acquired by the New Corporation pursuant to

the terms of this agreement are situated) to be stated in its certificate of incorporation, shall extend throughout:

All that territory in the State of New York included within the Counties of Monroe and Livingston; the Towns of Ontario, Walworth and Macedon, in Wayne County; the Towns of Manchester, Hopewell, Gorham, Farmington, Canandaigua, Victor, East Bloomfield, West Bloomfield, Richmond, Bristol, South Bristol, Canadice and Naples, in Ontario County; the Towns of Middlesex, Potter and Italy, in Yates County; the Towns of Prattsburg, Cohocton, Wayland, Dansville, Fremont and Avoca, in Steuben County; the Towns of Burns, Grove, Granger, Hume and Centerville, in Allegany County; the Towns of Eagle, Wethersfield, Orangeville, Attica, Pike, Gainesville, Warsaw, Middlebury, Covington, Perry, Castile and Genesee Falls, in Wyoming County; the Towns of Alexander, Bethany, Pavilion, Stafford, LeRoy, Byron and Bergen, in Genesee County, and the Towns of Kendall, Murray and Clarendon, in Orleans County.

The authorized capital stock of the New Corporation shall be seven million dollars ($7,000,000), divided into seventy thousand (70,000) shares of the par value of one hundred dollars ($100) each, of which one thousand (1,000) shares shall be Common Stock and sixty-nine thousand (69,000 [fol. 445] shall be Preferred Stock.

The Preferred Stock shall have the right to receive annually dividends at the rate of five per cent. (5%) payable semi-annually, on the first days of July and January (or at such other dates as may be determined by the Board of Directors) in each and every year, out of the earnings of said corporation in preference to any dividends upon the Common Stock; such dividends shall, except as hereinafter restricted, be cumulative, so that any deficiency in the five per cent. (5%) dividends to be paid on said Preferred Stock shall, except as hereinafter restricted, be made good out of the earnings of subsequent years before any dividends shall be paid upon the Common Stock, provided, that up to the close of the second fiscal year following the first issuance of Preferred Stock (whether of the whole or only part of the authorized amount of the Preferred Stock) such dividends shall not be cumulative, and that for the third fiscal year following such issuance the dividends shall be cumulative only as to three per cent. (3%) and for the fourth fiscal year only as to four per cent. (4%), and thereafter to the full

amount of five per cent. (5%), the fiscal year of the New Corporation to be the calendar year, provided, that if the first issuance of Preferred Stock be made prior to April first the balance of the calendar year in which such issue is made shall be deemed to be the first fiscal year for the purposes aforesaid, but, if made after April first, the first fiscal year, for the purposes aforesaid, shall not be deemed to begin until the first day of January following such first issue of Preferred Stock.

After the payment or declaration, in any calendar year, of the annual dividend upon the Preferred Stock, together with all accumulations, as hereinbefore provided, the Common Stock may receive and be paid a dividend of not ex- [fol. 446] ceeding five per cent. (5%), and if there then remain additional surplus earnings or net profits, the Preferred Stock shall participate pro rata with the Common Stock in any further dividends which may be declared up to an additional dividend of three per cent. (3%).

The Preferred Stock shall be entitled to be repaid to the full extent of its par value upon any distribution of the assets of the corporation, in the event of insolvency or dissolution, before any distribution of capital shall be made to the Common Stock, and shall share pro rata with the Common Stock in any surplus assets remaining after the Common Stock has been repaid to the full extent of its par value on any such distribution.

The holders of the Preferred Stock shall have equal voting power with the Common Stock, except that they shall be without power to vote at any meetings of the stockholders of the corporation held for the purpose of electing directors or for the adoption or amendment of the by-laws of the corporation, unless and until any time after the close of the second fiscal year (as hereinbefore defined) following the first issuance of Preferred Stock (whether of the whole or only part of the authorized amount of Preferred Stock) the corporation has failed (in which event it shall forthwith come into full voting power) to pay out of earnings dividends upon all of the issued and outstanding Preferred Stock at the rates provided to be cumulated as aforesaid, that is to say, three per cent. (3%) for the third fiscal year, four per cent. (4%) for the fourth fiscal year, following the first issuance, as aforesaid, of Preferred Stock, and five per cent. (5%) per annum thereafter.

The certificate of incorporation of said New Corporation shall further provide, that no vote or consent of stockholders favorable to the exercise of any of the rights, powers or privileges specified in either Section 104 of the Trans-
[fol. 447] portation Corporations Law or Sections 6, 8, 18, 61 or 62 of the Stock Corporation Law of the State of New York, as the same now exist, shall be or become effective for any purpose whatsoever unless concurred in by the affirmative vote of at least eighty per cent. (80%) of the then issued and outstanding Common Stock of said New Corporation.

Each stockholder entitled to vote at meetings held for the election of directors shall be entitled to as many votes as shall equal the number of his voting shares of stock multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit.

The term of existence of the New Corporation shall be perpetual.

The number of its directors shall be fifteen (15) and the certificate of incorporation shall provide that the directors need not be stockholders in the corporation.

There shall be an Executive Committee of the Board of Directors of five (5) directors, who shall be elected annually at a meeting of the Board of Directors; at every such election each director shall be entitled to five (5) votes, and he may cast all of such votes for a single director for the Executive Committee, or he may distribute them among the number to be voted for, or any two or more of them as he may see fit. Subject to such limitations and regulations as may be provided by the by-laws or as may otherwise be prescribed by law or by the Board of Directors, the Executive Committee shall have and exercise all the powers of the Board of Directors in the intervals between the meetings of the Board.

[fol. 448] The certificate of incorporation of the New Corporation shall further provide:

(1) That such corporation may purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and may issue in exchange therefor its stock, bonds or other obligations to the extent permitted by and subject to the laws covering corporations of this character:

(2) That such corporation shall also be authorized and empowered, to the extent permitted by and subject to the laws covering corporations of similar character:

To take, hold, own, lease, purchase, acquire, sell, convey, transfer, mortgage, let and dispose of, real and personal estate or interests or rights therein, without limit as to amount;

To construct, maintain, purchase, acquire, manufacture, operate, sell, mortgage, pledge, let, hire, furnish and deal in and with telegraph and telephone instruments, wires, cables, poles, ducts, conduits, lines of wire and cable and all kinds of works, property, machinery, apparatus, conveniences, appliances, devices, and things which are or may be capable of being used in connection with the conduct and operation of any of its powers, purposes and business;

To apply for, purchase, or in any manner to acquire, mortgage, pledge, or in any manner dispose of, licenses or other rights in respect of, and in any manner to deal in and with any and all rights, inventions, improvements and processes used in connection with or secured under letters patent or copyrights of the United States or other countries, or otherwise, and to work, operate, manufacture, develop, sell, grant and let the same;

[fol. 449] To carry on, promote, conduct and transact any business or businesses of a similar character connected directly or indirectly with the telegraph, telephone or kindred businesses or capable of being carried on in connection therewith, or which may be useful or convenient in connection with the powers, purposes or business of such corporation.

The certificate of incorporation of the New Corporation shall be in such form and contain such other provisions as shall be agreed upon by the Rochester Company and the New York Company and the Individual Parties, and approved by their counsel.

Second. The Individual Parties covenant and agree that for the purposes hereinafter provided and the proper corporate purposes of the New Corporation, said New Corporation shall duly make and cause to be executed with a trust company organized under the laws of the State of New York and in good standing, as trustee, a first and refunding general mortgage, due twenty-five (25) years after the date thereof, upon all the lines, plants, properties, businesses and good-will owned by the New Corporation, or which it may

subsequently acquire, in the sum of five million dollars ($5,000,000) to secure an issue of said amount of bonds, bearing interest at the rate of five per cent (5%) per annum, payable semi-annually in the City of Rochester and The City of New York. Such mortgage shall be a first lien upon all the lines, plants, properties, businesses and good-will of the New Corporation, including (other than those acquired by it from the Rochester Company) all the lines, plants, properties, businesses and good-will acquired by it in accordance with the terms of this agreement, and a lien upon the lines, plant, property, business and good-will acquired by it from the Rochester Company, subject and subordinate only to the present issued and outstanding mortgage bonds of the Rochester Company, which the Individual Parties [fol. 450] covenant and agree does not and shall not at any time exceed the sum of one million and ninety thousand dollars ($1,090,000) face value, viz: thirty-one thousand five hundred dollars ($31,500) face value of bonds issued and outstanding under the mortgage, dated March 27, 1900, made by the Rochester Company to the Rochester Trust & Safe Deposit Company, as Trustee, and one million fifty-eight thousand five hundred dollars ($1,058,500) face value of bonds issued and outstanding under the mortgage, dated December 31, 1903, made by the Rochester Company to said Rochester Trust & Safe Deposit Company, as Trustee. Provision shall be made in the aforesaid first and refunding general mortgage to be executed by the New Corporation as aforesaid, for the exchange, dollar for dollar, of bonds to be issued under said new mortgage for the bonds issued and outstanding under the aforesaid mortgages of the Rochester Company.

Such first and refunding general mortgage, and the bonds to be issued thereunder, shall be in such form and contain such terms and conditions as counsel for the Rochester Company and the New York Company and the Individual Parties shall approve, and shall follow substantially the form of the mortgage, dated January 1, 1913, made by the Mountain Home Telephone Company to the Columbia-Knickerbocker Trust Company, as Trustee.

Third. (A) The Rochester Company covenants and agrees to sell, assign, transfer, grant, convey and deliver, or cause to be sold, assigned, transferred, granted, conveyed and delivered to the New Corporation, and the Individual Parties covenant and agree to use their best endeavors to effect such

sale to and purchase and acquisition by the New Corporation, upon a date not later than twenty-four (24) months from the date of the delivery to the New York Company of conveyances of the properties of the Federal Telephone and Telegraph Company and its associated companies (herein- [fol. 451] after referred to as the Federal-New York Consolidation and hereinafter more particularly described) for the considerations and upon and subject to all the terms, provisions and conditions in this agreement stated, the following as an entirety, namely:

All the telephone and telegraph lines, plant, property, business and good-will thereof owned, operated or conducted by the Rochester Company; all the telephone and telegraph lines, plant, property, business and good-will thereof owned, operated or conducted by the Interlake (Canandaigua) Telephone Company; all the telephone and telegraph lines, plant, property, business and good-will thereof owned, operated or conducted by the Brockport Telephone Company, and all the telephone and telegraph lines, plant, property, business and good-will thereof owned, operated or conducted by the Bergen Telephone Company; the foregoing to include all the real estate, buildings, poles, wires, cables, crossarms, guys, insulators, subways, conduits, ducts, subsidiaries, coils, machines, switchboards, batteries, receivers, transmitters, instruments, tools, equipment, apparatus, appliances, devices, vehicles, materials, supplies, office furniture, office furnishings, appurtenances, goods, chattels and (excepting cash on hand and in bank) all other tangible or corporal property of every nature or description, and, except as otherwise provided by subdivision "(C) of this section, all grants, easements, rights of way, consents, permission, privileges and licenses, leases of real estate or other property, contracts with subscribers for telephone service, and choses in action, debts, bills, claims, judgments, book and other accounts against or due from subscribers, patrons or others, the good-will of the business and all and singular the property, real and personal, of every nature and description [fol. 452] whatsoever, owned, held, possessed, operated or used by the said Rochester Company, the Interlake (Canandaigua) Telephone Company, the Brockport Telephone Company and the Bergen Telephone Company, free from all mortgages, liens or encumbrances other than two mortgages, and the liens and encumbrances thereof, on the lines, plant,

property, business and good-will of the Rochester Company, viz: one mortgage, dated March 27, 1900, made by the Rochester Company to the Rochester Trust & Safe Deposit Company, as Trustee, under which there shall be issued and outstanding bonds of not more than thirty-one thousand five hundred dollars ($31,500) face value, and another mortgage, dated December 31, 1903, made by the Rochester Company to said Rochester Trust & Safe Deposit Company, as Trustee, under which there shall be issued and outstanding bonds or not more than one million fifty-eight thousand five hundred dollars ($1,058,500) face value.

(B) The New York Company covenants and agrees to sell, assign, transfer, grant, convey and deliver to the New Corporation, and the Individual Parties covenant and agree to use their best endeavors to effect the purchase and acquisition by the New Corporation, upon a date coincident with or shortly subsequent to the conveyances by subdivision "(A)" of this section provided for, but not later than three (3) months from the date of such conveyances, for the considerations and upon and subject to all the terms, provisions and conditions in this agreement stated, the following as an entirety, namely:

All the telephone and telegraph lines, plant, property, business and good-will thereof (excepting and reserving, however, the toll switchboards, accessories and appurtenances located in its "Main" central office in the City of Rochester, and the poles, cables, circuits, plant and property forming part of the trunk lines indicated on the map marked "A" and set forth in the Schedule marked "A-1", both hereto annexed and made part hereof, and such other trunk [fol. 453] lines or additions to trunk lines, used or intended to be used in the handling of toll business directly to or from points outside of the hereinafter described area, as may have been constructed since June 30, 1917, or may hereafter be constructed, and any and all exchange lines, plant and property within the hereinafter described area connected with or appurtenant to and operated from any exchange located outside of the hereinafter described area) owned, operated or conducted by the New York Company subsequent to said Federal-New York Consolidation within the area (more particularly also shown on the aforesaid map marked "A") described as follows:

All that territory included within the Counties of Monroe and Livingston; the Towns of Canandaigua, Victor, East Bloomfield, West Bloomfield, Richmond, Bristol, South Bristol, Canadice and Naples, in Ontario County; the Towns of Cohocton and Wayland, in Steuben County; the Towns of Pike, Gainesville, Warsaw, Middlebury, Covington, Perry, Castile and Genesee Falls, in Wyoming County, and the Towns of Pavilion, LeRoy and Bergen, in Orleans County; together with any and all exchange lines, plant and property outside of the area above described connected with or appurtenant to and operated from any exchange located within said area; the foregoing to include all the real estate, buildings, poles, wires, cables, crossarms, guys, insulators, subways, conduits, ducts, subsidiaries, coils, machines, switchboards, batteries, receivers and transmitters (other than American Bell Telephone Company receivers and transmitters), instruments, tools, equipment, apparatus, appliances, devices, vehicles, materials, supplies, office furniture, office furnishings, appurtenances, goods, chattels, and (except as aforesaid and excepting cash on hand and in banks) all other tangible or corporeal property of every nature or description, and, except as otherwise provided by subdivi- [fol. 454] sion "(C)" of this section, all grants, easements, rights of way, consents, permissions, privileges and licenses, leases of real estate or other property, contracts with subscribers for telephone service, and choses in action, debts, bills, claims, judgments, book and other accounts against or due from subscribers, patrons or others, the good-will of the business and all and singular the property, real and personal, of every nature and description whatsoever, owned, held, possessed, operated or used by said New York Company within the area aforesaid, free from all mortgages, liens or encumbrances.

(C) It is not the intention of the parties hereto to include, and there shall not be included, in the above sales and purchases, any property or business outside the State of New York, nor, except as by this subdivision otherwise provided, any of the municipal street franchises, grants, permissions or consents owned, held or operated under by the above named companies; nor any of the toll line contracts or agreements which said companies or any of them may have with other telephone or telegraph systems or companies for the interchange of traffic; nor any switching service

contracts or agreements; nor any contracts or agreements with other telephone, telegraph, light, heat, power, railway, electric or other corporations for joint ownership or joint use of poles, subway, plant or other equipment or for attachment or contact rights or privileges, which any of said companies have or which affect any part of said lines, plant or property, except those specified in Schedules "B" and "C" hereto annexed and made part hereof, and the Rochester Company covenants and agrees to and shall assign, transfer and deliver, or cause to be assigned, transferred and delivered, to the New Corporation as a part of the properties described under subdivision "(A)" of this section those specified in said Schedule "B"; and the New [fol. 455] York Company covenants and agrees to and shall assign, transfer and deliver to the New Corporation as part of the property described under subdivision "(B)" of this section those specified in said Schedule "C".

Fourth. The considerations to be given by the New Corporation for and on account of the lines, plants, properties, businesses and good-will severally to be conveyed to it as aforesaid, shall be as follows:

(A) The New Corporation shall pay to the Rochester Company and its nominees, for the properties described under subdivision "(A)" of Section "Third" hereof, a sum in cash equal to the aggregate value, to the New Corporation, of such properties at the time of the closing of title, agreed upon and determined as hereafter in this section and sections "Fifth" and "Sixth" provided, less the face value of the one million and ninety thousand dollars ($1,090,000) of bonds (and the unpaid interest accrued thereon) issued and outstanding under the aforesaid mortgages of the Rochester Company, or the New Corporation may, at its option, in the place and stead of such amount of cash, issue and deliver bonds under the first and refunding general mortgage by section "Second" hereof provided to be executed by it of a like amount par value, in full payment for such properties; accrued interest on such bonds to be adjusted at or as of the date of closing of title.

And the New Corporation shall, in addition, assume and agree to pay the aforesaid one million and ninety thousand dollars ($1,090,000) face value of the Rochester Company's mortgage bonds, together with the unpaid interest accrued thereon.

(B) The New Corporation shall issue and deliver to the [fol. 456] New York Company in full payment for the property described under subdivision "(B)" of section "Third" hereof, its Preferred Stock to an amount equal, at par, to the aggregate value, to the New Corporation, at the time of the closing of title, of such property, agreed upon and determined as hereinafter in this section and sections "Fifth" and "Sixth" provided.

The properties described in and provided by section "Third" hereof to be conveyed (exclusive of state and municipal franchises and choses in action, debts, bills, claims, judgments and accounts receivable) to the New Corporation, have been inventoried and appraised as of June 30, 1917; based upon the inventories and appraisals so made (identified by the signatures of the parties hereto this day) and subject to correction for manifest errors therein, the parties hereto do now stipulate and agree that for the purposes of this agreement the value to the New Corporation of such properties (as of June 30, 1917) shall be taken and deemed to be the following amounts, namely:

Those described under subdivision "(A)" of section "Third" hereof, the sum of	$1,364,400
Those described under subdivision "(B)" of section "Third" hereof, the sum of	$4,206,800

and, with such additions thereto or deductions therefrom as may, according to the inventories and appraisals by section "Sixth" hereof provided for, be required to be made to arrive at the values thereof at the time of the closing of title, the amounts above stated (plus an amount equal to the then value of the choses in action, debts, claims, judgments and accounts receivable transferred to the New Corporation) shall be the price to be paid by the New Corporation therefor; provided, the amounts so arrived at be ap- [fol. 457] proved by the Public Service Commission of the State of New York, Second District, or its successor in authority, otherwise such considerations shall be in such amounts (provided the basis for such change be applied equally to all the properties involved) as said Commission, or its successor in authority, may determine or as may judicially finally be determined to be the values thereof.

Such respective consideration shall be paid and delivered by the New Corporation only upon the delivery to it of deeds,

conveyances, instruments and documents which shall and will effectively assign, grant, convey and transfer to it, its successors and assigns, good, valid, legal and indefeasible title to the aforesaid respective lines, plants, properties, businesses and good-will, free, except such as are herein provided to be assumed by the New Corporation, from all bills, debts, assessments, taxes, obligations, judgments, mortgages, liens or encumbrances.

Fifth. From and after the date of this agreement the books and accounts of the Rochester Company, the Interlake (Canandaigua) Telephone Company, Brockport Telephone Company and Bergen Telephone Company shall, and the Rochester Company covenants that such books and accounts shall be kept strictly in accordance with the method and system of accounts prescribed by the Public Service Commission, Second District, or its successor in authority, for telephone corporations, the New York Company covenanting to keep its own books and accounts in like manner, so that the true and proper valuations thereafter from time to time of their respective properties may, in conjunction with the inventories and appraisals herein referred to and provided for, be ascertained for the purposes of this agreement.

[Vol. 458] Sixth. Upon ten (10) days' notice in writing given by either Company to the other, the Rochester Company and the New York Company shall each appoint a competent engineer to make detailed inventories of and to appraise the properties, corporeal and incorporeal (other than state and municipal franchises), described in and provided by section "Third" hereof to be conveyed to the New Corporation.

Such inventories and appraisals of the several properties shall be made as of the same date and shall separately specify the book values (so far as the same may be ascertainable), the estimated reproduction cost new, the structural values of the corporeal properties, and as well, so far as possible, the then present value of the incorporeal properties (other than state and municipal franchises), including the intangible elements of property constituting part of the total valuation of telephone and telegraph properties as going concerns.

In the event that the engineers so appointed cannot agree as to the units of property, or the units of value to be ap-

plied in any particular case or the valuation to be placed as above upon any particular property or properties, such units of property, value or valuation shall be determined by a competent engineer, to be selected by said two engineers, as referee, or, in the event of their failure to agree upon such an engineer, application shall be made by the Rochester Company and the New York Company, or either, should the other refuse, to the Chairman or the Public Service Commission of the State of New York, Second District, or its successor in authority, for the appointment of such referee; in either contingency, the determination of the referee shall be used and incorporated in such inventories and appraisals. In the event of the death or disability of any engineer so selected or appointed, his suc-[fol. 459] cessor shall be selected or appointed in the manner the engineer to be succeeded was originally selected or appointed. The fees and disbursements of any referee or referees selected or appointed, as aforesaid, shall be divided between and borne equally by the Rochester Company and the New York Company, but each Company shall pay the fees and disbursements of any engineer appointed by it and bear any other expense incurred by it in the making of such inventories and appraisals.

Such inventories and appraisals shall, in the first instance, be made as of June 30th, 1917, and, subject to correction for manifest errors, the inventories and appraisals made and mentioned in paragraph "Fourth" of this agreement shall be taken and deemed to be correct and complete. From time to time hereafter, as the parties may determine, such inventories and appraisals shall be continued and brought up to date, to the end that complete inventories and appraisals shall be available at the time of the closing of title hereunder. Such further or continued inventories and appraisals so provided for shall be made upon the same bases as to unit prices, overhead construction costs, depreciation, etc., as the inventories and appraisals of June 30, 1917, already made.

Seventh. Said deeds, conveyances, instruments and documents and possession of the lines, plants, properties, businesses and good-will, described in section "Third" hereof, shall be delivered to the New Corporation, and the aforesaid considerations paid or delivered at the offices of Hubbell, Taylor, Goodwin and Moser, 19 Main Street, West,

in the City of Rochester, N. Y., on a date of which the Individual Parties shall give the other parties hereto three (3) months' written notice at their respective principal [fol. 460] offices, but such date and time of delivery and closing of title shall in no event be later than the respective dates in section "Third" hereof provided for.

In addition to the deeds, conveyances, instruments and documents delivered as aforesaid, the Individual Parties and the Rochester Company covenant and agree that they will make, or cause to be made, executed, acknewledged and delivered to the New Corporation, its successors and assigns, any and all other deeds, conveyances, instruments and documents in writing, under seal or otherwise, which the New Corporation, its successors or assigns, or its or their counsel, may deem necessary, convenient or proper for the transfer of or for assuring to the New Corporation, its successors and assigns, the lines, plants, properties, businesses and good-will provided by subdivision "(A)" of section "Third" hereof to be conveyed to the New Corporation, free, except as herein otherwise provided, from all bills, debts, assessments, taxes, obligations, judgments, mortgages, liens or encumbrances, and the New York Company covenants and agrees to similarly make, execute, acknowledge and deliver to the New Corporation similar deeds, conveyances, instruments and documents to assure to the New Corporation, its successors and assigns, the lines, plant, property, business and good-will provided by subdivision "(B)" of section "Third" hereof to be conveyed to the New Corporation, free from all bills, debts, assessments, taxes, obligations, judgments, mortgages, liens or encumbrances, and the Rochester Company and the New York Company shall respectively pay to the New Corporation [fol. 461] a sum equal to the amount of unearned prepaid service payments made on account of the service contracts transferred to the New Corporation pursuant to subdivisions "(A)" and "(B)", respectively, of said section "Third" hereof.

Eighth: The Rochester Company, with respect to the properties described under subdivision "(A)" of section "Third" hereof, covenants and agrees, and the New York Company, with respect to the property described under subdivision "(B)" of said section "Third" covenants and agrees:

A. That until the acceptance of delivery of title and taking of possession by the New Corporation, the lines, plant and property affected by this agreement shall be diligently preserved and maintained at their present standard.

That no part of or interest in said lines, plant, property, business or good-will shall be sold, exchanged, assigned or transferred between the date hereof and the date of closing of title except with the written consent of all the parties hereto; should it be necessary or expedient during such times to sell, exchange, assign or transfer, or cause to be sold, exchanged, assigned or transferred, any part of or interest in said lines, plant, property, business or good-will in order to comply with or carry out any of the terms, provisions or conditions of this agreement, or otherwise, the parties hereto may in their discretion from time to time consent thereto upon the agreement of the parties in writing to reduce the consideration hereinabove stated by such sum and amount as shall equal the reasonable value of the part [fol. 462] of or interest in said lines, plant, property or business so sold, assigned or transferred. In case of exchange of property the difference between the reasonable value of the property surrendered and of that acquired shall be deducted from or added to the consideration as the case may be. Such reasonable value shall in each and every case be fixed and determined in the manner provided by section "Sixth" hereof by an engineer appointed by the Home Company and an engineer appointed by the New York Company, or in case of the failure of such engineers to agree upon the matters in question, as in said section provided, by an engineer appointed as referee in the manner by said section provided.

B. That each corporation owning or controlling property affected by this agreement shall comply with the provisions of Section 104 of the Transportation Corporations Law and with all other provisions of the laws of the State of New York, and shall obtain all consents, approvals and authorizations from Federal, state or municipal authorities which may be required by any federal law, or by any law, statute or ordinance of said State of New York or political subdivision thereof, or by any franchise or grant under which any of the property affected is being operated, or which may be necessary in order to transfer, grant, convey and deliver a good, valid, legal and indefeasible title to the

New Corporation, its successors and assigns, at the time of the delivery of possession and closing of title. The deeds, conveyances, instruments and documents intended to grant and convey such title to the New Corporation shall also be in form and executed, attested and acknowledged in manner approved by counsel to the New Corporation. Each parcel [fol. 463] of real estate shall be conveyed by separate deeds containing full covenants and warranty clauses, except as herein otherwise provided.

C. That prior to the date of the delivery of possession and closing of title, all contracts or agreements with any telephone, telegraph, light, heat, power, railway, electric or other corporations, for joint ownership or joint use of poles, subway, plant or other equipment, or for attachment or contact rights or privileges, which affect any or part of such lines, plant or property, shall be cancelled and terminated, except such of said contracts or agreements as are specified in Schedules "B" and "C" hereto annexed.

D. That prior to the date of the delivery of possession and closing of title, all contracts with subscribers under which telephone service is furnished over or by means of said lines, plant or property shall on said date of delivery and closing of title be subject to termination upon written notice to the subscribers of not longer than thirty (30) days.

Ninth. It is expressly understood and agreed that except as specified in sections "Fifth" and "Sixth" and subdivision "A" of section "Eight" hereof, none of the parties hereto shall have any obligation whatsoever to any other party or parties hereto under or by reason of this agreement or anything in it contained unless and until the delivery to the New York Company of conveyances of the telephone and telegraph lines, plants and properties in the State of New York owned, operated or controlled by the Federal Telephone and Telegraph Company and its associated companies in accordance with the provisions of the certain agreement in writing, bearing date April 15, 1916, [fol. 464] between said Federal Telephone and Telegraph Company, Burt G. Hubbell, and the New York Company (hereinbefore sometimes referred to as the Federal-New York Consolidation); and the Individual Parties, jointly and severally, further agree that the other parties hereto have and shall have no obligations whatever under or by reason

of this agreement or anything in it contained, except as specified in the aforesaid sections "Fifth" and "Sixth" and subdivision "A" of section "Eighth", unless within the time herein limited therefor, the Individual Parties, in additional to each and every other covenant and agreement herein made and entered into by the Individual Parties, whether for themselves or jointly and severally with any other party or parties hereto, completely comply with and carry out or cause to be complied with and carried out each and every one of the terms, provisions and conditions set forth and contained in the following paragraphs marked "(A)" to "(F)", inclusive, and the Individual Parties agree and the other parties hereto agree with each other that if the Individual Parties are unable to comply with and carry out or cause to be complied with and carried out each and every such term, provision and condition, and each and every covenant and agreement aforesaid, the other parties hereto shall incur no liability to the Individual Parties nor the other parties hereto any liability to each other.

(A) The Individual Parties shall, not later than twenty-one (21) months after the consummation of the Federal-New York Consolidation, have secured and effected a preponderance of public sentiment in the communities served by the Rochester Company, the Interlake (Canandaigua) Telephone Company, the Brockport Telephone Company, the Bergen Telephone Company and by the New York Company in the territory served by the lines, plant and property provided by subdivision "(B)" of section "Third" [fol. 465] hereof to be conveyed to the New Corporation, in favor of the consolidations by this agreement contemplated and of the schedule of rates set forth in the Schedule marked "D" hereto annexed and made part hereof, so that the same may become effective upon the consolidations of the properties and businesses by this agreement contemplated.

The Individual Parties shall both before and after said date of closing, present competent evidence of the existence of such preponderance of public sentiment, and, to the extent of their ability, of the justness, reasonableness and propriety of such rates, to the Public Service Commission, or such other board or body as may succeed to and have its power and jurisdiction, and do everything within their power, both before and after the date of closing, as may be necessary or desirable in order to obtain the approval

of said rates by the said Commission, board or body, or to legally sustain and enforce the same.

(B) The Individual Parties shall, not later than twenty-one (21) months after the consummation of the Federal-New York Consolidation, have obtained from the federal Department of Justice its written statement substantially to the effect that said Department has no objection to and will consent to the consummation of the sales and purchases and consolidations contemplated by this agreement; such written statement shall be of force and effect on the date of the closing of title and delivery of possession, and consented to by the Attorney General of the United States then in office.

(C) The Public Service Commission of the State of New York, Second District, or its successor in authority, shall have duly granted permission and approval to the New Corporation for the construction of its telephone and telegraph lines; shall have also duly granted said New Corpo- [fol. 466] ration a certificate of public convenience and necessity; shall have authorized the issuance by the New Corporation of the stocks and bonds (of the kind and character and in the amounts) by this agreement provided to be issued or required to be issued for and in connection with the conveyance to the New Corporation of the properties aforesaid and shall have duly approved the assignment and transfer of such municipal street franchises of the corporations whose properties are involved in the consolidations by this agreement contemplated as are to be included in the conveyances aforesaid.

(D) All consents, approvals and authorizations from federal, state or municipal authorities which may be required by any federal law, or by any law, statute or ordinance of the State of New York or political subdivision thereof, or by any franchise or grant under which any of the property affected is being operated, or which may be necessary in order to transfer, grant, convey and deliver a good, valid, legal and indefeasible title to the New Corporation, its successors and assigns, in and to the properties in accordance with this agreement contemplated to be conveyed to said New Corporation have been duly secured and remain in effect at the time of closing of title.

(E) The properties described under subdivision (A) of section "Third" hereof shall, and the Individual Parties

covenant and agree that they will at the time of closing of title hereunder, be free and clear from any and all mortgages, liens or encumbrances thereon, except the hereinbefore mentioned mortgage lien of one million and ninety thousand dollars ($1,090,000) upon the property owned, operated or conducted by the Rochester Company.

(F) The New Corporation shall have adopted, provided for and committed itself to a plan for employees' pensions, disability benefits and death benefits substantially similar [fol. 467] to that now in force by the New York Company wherein it shall also be provided that an employee's term of employment, as therein defined, shall include employment not only in the New Corporation but also his or her previous employment in the Rochester Company, the Interlake (Canandaigua) Telephone Company, the Brockport Telephone Company, the Bergen Telephone Company, the New York Company, the Federal Telephone and Telegraph Company or their or any of their predecessors or affiliated companies.

Tenth. The Individual Parties shall, and they hereby jointly and severally covenant and agree that they will, prior to the consolidations by this agreement contemplated subscribe for and purchase, or cause to be subscribed for and purchased, for cash at par six hundred and sixty-five shares of the Common Stock of the New Corporation of the par value of one hundred dollars ($100) each, and the New York Company covenants and agrees similarly to subscribe and purchase for cash at par three hundred and thirty-five (335) shares of said Common Stock.

Eleventh. If and as soon as each and every one of the foregoing terms, conditions and provisions have been completely fulfilled and complied with, the New York Company agrees on the demand of the New Corporation to purchase from the New Corporation and pay for at such price as the Public Service Commission of the State of New York, Second District, or its successor in authority, may authorize the New Corporation to sell the same for the purpose of furnishing the New Corporation with working capital, not exceeding one hundred and fifty thousand dollars ($150,000) face value of bonds of the New Corporation issued under the first and refunding general mortgage aforesaid.

Twelfth. If and as soon as each and every one of the foregoing terms, conditions and provisions have been completely

fulfilled and complied with, the New York Company agrees [fol. 468] to enter into a toll line contract or agreement with the New Corporation for the interchange of traffic upon the terms and conditions set forth in the proposed traffic agreement, marked "E", hereto annexed and made part hereof.

Thirteenth. The foregoing provides for the transfer by the New York Company to the New Corporation of certain trunk, or toll pole lines, wires and cables, and for the retention by the New York Company of certain other trunk, or toll pole lines, wires and cables which are indicated on the map marked "A" and set forth in the Schedule marked "A-1". It may, after the consummation of the sales and purchases hereinbefore provided for, be found to be more expedient for the New Corporation to acquire and operate certain of the lines so retained by the New York Company, and for the New York Company to re-acquire from the New Corporation certain of those lines transferred. It is, therefore, expressly provided that the New York Company shall within two years after the closing of title hereunder, select from the trunk, or toll pole lines, wires and cables set forth in subdivisions numbered 2, 4, 8, 20, 21, 27, 31, 38 and 39 of Schedule "A-1", those which (subject to the limitation hereinafter set forth) it desires permanently to retain and those which (subject to the limitation hereinafter set forth) it desires to sell to the new Corporation, and shall give to the New Corporation written notice thereof, and the New Corporation shall acquire and pay for so much of said lines as (subject to the limitation hereinafter set forth) the New York Company may by said notice require.

The price to be paid for such lines shall be determined as in this agreement provided with reference to the other properties to be acquired by the New Corporation from the New York Company, and shall be paid in Preferred Stock of the New Corporation at par (inventories and appraisals [fol. 469] to be made upon the same bases as to unit prices, overhead construction costs, depreciation, etc., as the inventories and appraisals already made hereunder); provided, however, that the New Corporation shall not, under this provision, be obliged to acquire additional trunk, or toll pole lines, wires and cables, having, in the aggregate, an appraised reproduction cost-new, when determined as hereinabove provided, in excess of two hundred and twenty-five

thousand dollars ($225,000), and, provided further that the New York Company shall and it hereby agrees that it will, under this provision, sell to the New Corporation additional trunk, or toll pole lines, wires and cables (part of those set forth in subdivisions numbered 2, 4, 8, 20, 21, 27, 31, 38 and 39 of Schedule "A-1") having, in the aggregate, an appraised reproduction cost-new, when determined as hereinabove provided, of at least one hundred and forty-five thousand dollars ($145,000).

And likewise, within the same time and by the same method and upon the same terms and conditions aforesaid, the New Corporation shall sell to the New York Company, and the New York Company, at its option, may purchase and re-acquire from the New Corporation any or all of the following:

(a) The toll line and its appurtenances between Victor and Mumford, at present owned by the Federal Telephone & Telegraph Company, upon condition, however, that the New York Company shall at the same time transfer to the New Corporation, and the New Corporation shall acquire, the toll line between Victor and Pittsford, being the line described in subdivision 20 of Schedule "A-1";

(b) The toll line and appurtenances on the Fairport Road between its junction with East Avenue and the Village of Fairport (sometimes called the Fairport Loop), upon condition, however, that the New York Company shall at the same time transfer or cause to be transferred to the New Corporation, and the New Corporation shall acquire, so much of the Rochester-Syracuse toll line of the American Telephone & Telegraph Company as lies between Allen's Creek and the Village of Fairport;

[fol. 470] (c) So much of the Rochester-Pittsford toll line as lies between its junction with the Rochester-Syracuse toll line of the American Telephone & Telegraph Company at Allen's Creek and Pole #210 in the Village of Pittsford;

(d) So much of the Rochester-Fairport-Palmyra toll line of the Federal Telephone & Telegraph Company with its appurtenances as lies between its junction with the Rochester-Syracuse toll line of the American Telephone & Telegraph Company, about one mile west of the Village of Fairport and the western boundary line of Wayne County.

In cases where the New York Company is to simultaneously transfer or cause to be transferred other lines to the New Corporation, as provided in paragraphs (a) and (b) above, the difference, to be determined as aforesaid, in price to be paid, if in favor of the New York Company, shall be paid in Preferred Stock of the New Corporation at par, and if in favor of the New Corporation, shall be paid in cash; and in the cases provided for in paragraphs (c) and (d) above, the price shall be paid in cash.

At the time of closing title hereunder an agreement to the foregoing effect shall be entered into by the New York Company and the New Corporation.

Fourteenth. No waiver, modification, amendment or change of any term, condition or provision in this agreement contained shall be valid or of any force or effect unless made in writing, signed by all the parties hereto and specifying with particularity the nature and extent of such waiver, modification, amendment or change. The signing of such writing or writings in any instance or instances shall in no event be construed to be a general waiver, abandonment, modification, amendment or change of any of the terms, conditions or provisions herein contained, but the same shall be strictly limited and restricted to the extent and occasion specified in such signed writing or writings.

Fifteenth. The provisions of this agreement shall inure [fol. 471] to the benefit of and bind the successors, assigns, heirs, executors and administrators of the respective parties hereto.

In Witness Whereof, the parties have executed this agreement under seal in triplicate, and have delivered the same on the day and year first above written.

Signed, sealed and delivered in the presence of:

George R. Fuller. (L. S.) Fred W. Zoller. (L. S.) W. Roy McCanne. (L. S.) Rochester Telephone Company, by George R. Fuller, President. (Seal.)

Attest: Fred C. Goodwin, Secretary.

New York Telephone Company, by F. H. Bethell, 1st Vice President. (Seal.)

Attest: J. Kennedy, Asst. Secretary.

[fols. 472-487] RESP'S EXHIBIT 5

This Agreement, made and entered into at the City of Rochester, N. Y., this 25th day of February, one thousand nine hundred and eighteen, by and between George R. Fuller, W. Roy McCanne and Frederick W. Zoller, all of the City of Rochester, N. Y., parties of the first part (hereinafter collectively referred to as the Individual Parties), and the New York Telephone Company, a corporation of the State of New York, having its principal office at 15 Dey Street, Borough of Manhattan, The City of New York, N. Y., party of the second part (hereinafter referred to as the New York Company), Witnesseth:

Whereas, within the territory in the State of New York comprising the Counties of Monroe and Livingston and parts of the Counties of Ontario, Yates, Steuben, Wyoming and Genesee, various lines of telephone and telegraph, plant, property and business are severally owned, operated and conducted by the Rochester Telephone Company, the Interlake (Canandaigua) Telephone Company, the Brockport Telephone Company and the Bergen Telephone Company (hereinafter collectively referred to as the Rochester System), by the Federal Telephone and Telegraph Company and its associated companies (hereinafter referred to as the Federal System) and by the New York Company, resulting in a divided and incomplete telephone service to the public and a wasteful duplication of plant and of operating and administration expenses; and

Whereas, the Individual Parties have represented to the New York Company, and the New York Company believes, that there is a preponderance of public sentiment in the communities in said territory served by the companies aforesaid and as well a preponderance of sentiment among the municipal authorities therein in favor of a unification of telephone service within said territory, preferably along the [fol. 488] lines outlined in a plan submitted by the Individual Parties to the New York Company wherein and whereby it is contemplated that a new telephone corporation be formed to take over and operate the properties of the Rochester System and the properties of the Federal System and of the New York Company in the territory aforesaid, and that the management and control of such new corporation be vested in the Individual Parties and their associates, to the

end that the large majority of the members of the Board of Directors of the new corporation may and shall be residents or business men of said territory and in no way affiliated or connected with the American Telephone and Telegraph Company or the New York Company or their or either of their associated companies; and

Whereas, the New York Company has heretofore entered into an agreement contemplating the purchase, under certain contingencies, of the telephone and telegraph lines, plants and properties in the State of New York owned, operated or controlled by the Federal Telephone and Telegraph Company and its associated companies, the greater part of which are located in the County of Erie and outside of the above described territory, and is willing, if such purchase be consummated and the properties of the Rochester System be conveyed to such new corporation, to convey to such new corporation all of its lines, plant and property within the territory aforesaid (including those so acquired by it from the Federal Telephone and Telegraph Company and its associated companies) provided certain conditions precedent are complied with; and

Whereas, the Individual Parties, the Rochester Telephone Company and the New York Company are accordingly about to enter into an agreement in writing, bearing even date herewith, wherein and whereby it is provided that under certain contingencies and upon compliance with [fol. 489] certain conditions precedent the various properties aforesaid shall be conveyed to a new corporation to be formed; and

Whereas, in the opinion of the parties hereto, it is to the mutual benefit of the Rochester Telephone Company and the New York Company, as well as to the benefit of the public, that such consolidation be effected, and in and by the terms of said agreement bearing even date herewith the Individual Parties and the Rochester Telephone Company severally or jointly and severally (the New York Company not wishing to participate in such obligation) assume the obligation of complying with certain conditions precedent of said agreement, and the New York Company assumes no obligation to convey its aforesaid properties to such new corporation unless and until all the properties of the Rochester System are about to be or have been duly conveyed to such new corporation in accordance with all

the terms, provisions and conditions of said agreement, and it is deemed proper by and agreed between the parties hereto that the New York Company in lieu of assuming any obligation with respect to such conditions precedent shall, upon the consummation of such consolidation, pay to the Individual Parties the sum hereinafter provided:

Now, Therefore, in consideration of the premises and the execution by the Individual Parties and the Rochester Telephone Company of the aforesaid agreement bearing even date herewith, and the mutual covenants and agreements herein contained, each of the Individual Parties for himself, his heirs, executors, administrators and assigns, and the New York Company, for itself, its successors and assigns, covenant and agree as follows:

First. In the event that the telephone and telegraph lines, plants and properties in the State of New York owned, operated or controlled by the Federal Telephone and Telegraph Company and its associated companies, both within and [fol. 490] without the territory above described, are consolidated with the lines, plant and property of the New York Company in accordance with the provisions of the agreement in writing, bearing date April 15, 1916, between said Federal Telephone and Telegraph Company, Burt G. Hubbell and the New York Company, and in the further event that, as provided in the aforesaid agreement bearing even date herewith, the Individual Parties and the Rochester Company severally, or jointly and severally, as therein provided, within the times therein limited therefor, completely comply with and carry out or cause to be complied with and carried out each and every one of the terms, provisions and conditions in said agreement by them undertaken to be complied with and carried out, and fulfill and meet every other covenant and agreement by them or any of them in said agreement made and agreed, and the aforesaid properties of the Rochester System are, as provided by said agreement of even date herewith, duly conveyed to a new corporation formed as therein provided, the New York Company shall pay to the Individual Parties the sum of seventy thousand dollars ($70,000), which said sum the Individual Parties shall accept in full payment and compensation for all of the work and labors by said agreement bearing even date herewith, provided to be done and performed by them, including all or any of their time devoted

to the prosecution thereof, and expenses incidental thereto, said Individual Parties hereby covenanting and agreeing to release and discharge the Rochester Telephone Company, the Interlake (Canandaigua) Telephone Company, the Brockport Telephone Company, the Bergen Telephone Company and the New York Company, from any further or other claims or demands for compensation for or in connection therewith.

Second. The Individual Parties shall, as contemplated by section "Tenth" of the aforesaid agreement bearing even [fol. 491] date herewith, invest sixty-six thousand five hundred dollars ($66,500) of the sum aforesaid in the purchase by them of six hundred and sixty-five (665) shares of the Common Stock of the new corporation to be formed as aforesaid, and, in order to assure local management and control of said new corporation as by said agreement contemplated, the Individual Parties shall, and the New York Company hereby admits that the aforesaid plan of the Individual Parties contemplates that they will, forthwith subject all and every one of said six hundred and sixty-five (665) shares of Common Stock to a voting trust agreement to be made pursuant to Section 25 of the General Corporation Law of the State of New York, and to provide:

That three residents or business men of the aforesaid territory (who are to be men in no way affiliated or connected with the American Telephone and Telegraph Company or the New York Company, or their or either of their associated companies) to be selected by the Individual Parties shall be Voting Trustees; that said six hundred and sixty-five (665) shares of Common Stock, with sufficient transfers thereof in favor of said Voting Trustees shall be deposited with a Trust Company organized under the laws of the State of New York and in good standing, and such Trust Company shall surrender all of such certificates of stock to the new corporation to be cancelled and shall obtain in place thereof certificates in the names of said Voting Trustees (for the purpose of vesting in them the right to vote thereon during the continuance of said voting trust agreement) wherein it shall appear that the same are issued pursuant to said voting trust agreement; that such certificates shall be held by said Trust Company during the continuance of said voting trust agreement; that voting trust certificates shall be issued by the Voting Trustees in ex-

change for the stock so deposited with said Trust Company, [fol. 492] which said voting trust certificates shall be valid only when countersigned by said Trust Company; that the declared purposes of said voting trust are and shall be to elect to membership of the Board of Directors of said new corporation a majority of members who shall be residents or business men of the territory aforesaid, and who shall be in no way affiliated or connected with the American Telephone and Telegraph Company or the New York Company, or their or either of their associated companies; that such voting trust shall continue for five years from the date of the execution and delivery of such voting trust agreement, provided, however, that the same shall forthwith terminate if at any time after the close of the second fiscal year following the first issuance of Preferred Stock by the new corporation (whether of the whole or only part of the authorized amount of Preferred Stock) said corporation has failed to pay out of earnings, dividends upon all of its issued and outstanding Preferred Stock at the rate provided in its certificate of incorporation to be the preference rate of participation in the earnings of said corporation which such stock shall have. It is understood and agreed that the fiscal year of such new corporation shall be the calendar year, but if the first issuance of Preferred Stock be made prior to April first, the balance of the calendar year in which such issue is made shall be deemed to be the first fiscal year for the purposes aforesaid, and if made after April first, the first fiscal year, for the purposes aforesaid, shall not be deemed to begin until the first day of January following such issuance of Preferred Stock.

Such voting trust agreement shall provide for the appointment of a successor trustee upon the disability, death or resignation of a voting trustee, and may contain such other provisions, not contrary to or inconsistent with the [fol. 493] foregoing, as the Individual Parties and their associates may deem expedient, and shall provide that every other stockholder of the new corporation, upon his request therefor, may, by a like agreement in writing, also transfer his stock to the Voting Trustees and thereupon may participate in the terms, conditions and provisions of said agreement.

Third. If, notwithstanding the best efforts of the Board of Directors of the new corporation, the affairs of the new

corporation should not prosper sufficiently to pay dividends as aforesaid upon the issued and outstanding Preferred Stock, and such Preferred Stock, in accordance with the provisions of the certificate of incorporation of the new corporation, comes into full voting power, the New York Company agrees (in order that the Individual Parties may nevertheless and in any event be assured of some compensation for the work and labors aforesaid undertaken and performed by them), upon the written demand of the Individual Parties, to purchase all of said six hundred and sixty-five (665) shares of Common Stock at fifty per cent. (50%) of its par value, viz: for the sum of thirty-three thousand two hundred and fifty dollars ($33,250).

Fourth. This agreement shall inure to the benefit of and shall be binding upon the heirs, executors and administrators, and the successors and assigns, of the respective parties hereto.

In Witness Whereof, the parties have executed this agreement under seal in triplicate, and have delivered the same on the day and year first above written.

Signed, sealed and delivered in the presence of:

(Sgd.) George R. Fuller. (L. S.) (Sgd.) Fred W. Zoller. (L. S.) (Sgd.) W. Roy McCanne. (L. S.)

New York Telephone Company, by (Sgd.) F. H. Bethell, 1st Vice President. (Seal.)

Attest: J. V. Kennedy, Asst. Secretary.

[fol. 494] Acknowledged at Rochester, N. Y., July 29, 1918 by George R. Fuller, W. Roy McCanne and Frederick W. Zoller.

Acknowledged at New York City, July 15, 1918 by Frank H. Bethell.

[fol. 495] RESP'S EXHIBIT 6

This Supplemental Agreement, made and entered into at the City of Rochester, N. Y., this first day of March, one thousand nine hundred and twenty, by and between George R. Fuller, W. Roy McCanne and Frederick W. Zoller, all of the City of Rochester, N. Y., parties of the first part (hereinafter collectively referred to as the Individual

Parties), the Rochester Telephone Company, a corporation of the State of New York, having its principal office at 59 Stone Street, in the City of Rochester, N. Y., party of the second part (hereinafter referred to as the Rochester Company), and the New York Telephone Company, a corporation of the State of New York, having its principal office at 15 Dey Street, Borough of Manhattan, The City of New York, N. Y., party of the third part (hereinafter referred to as the New York Company), Witnesseth:

Whereas, the parties hereto heretofore entered into an agreement in writing, bearing date the twenty-fifth day of February, one thousand nine hundred and eighteen, and desire, in the particulars hereinafter set forth, to supplement and modify the aforesaid agreement;

Now, Therefore, in consideration of the premises, of the sum of one dollar ($1.00), lawful money of the United States, and other valuable considerations, paid by each of the parties hereto to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, each of the parties of the first part, for himself, his heirs, executors, administrators and assigns, and each of the other parties for itself, its successors and assigns, hereby covenants and agrees as follows:

First. That the first paragraph of section "Second" of [fol. 496] the aforesaid agreement be marked "(A)", and that said paragraph be and the same hereby is amended: (1) by changing the principal sum of the mortgage and bonds therein mentioned from five million dollars ($5,000,000) to ten million dollars ($10,000,000); and (2) by providing that such mortgage shall be subordinate only to the present issued and outstanding mortgage bonds of the Rochester Company, which the Individual Parties covenant and agree does not and shall not at any time exceed the sum of one million fifty-eight thousand five hundred dollars ($1,058,500) face value, viz: said amount, face value, of bonds issued and outstanding under the mortgage, dated December 31, 1903, made by the Rochester Company to the Rochester Trust & Safe Deposit Company, as Trustee; and (3) by changing the word "mortgages" in the last sentence of said paragraph to "mortgage".

Second. That after the second paragraph of said section "Second" of the aforesaid agreement, the following paragraphs be added, viz:

"(B) The Individual Parties further covenant and agree that for the purposes hereinafter provided and the proper corporate purposes of the New Corporation, said New Corporation shall duly make and cause to be executed with a Trust Company organized under the laws of the State of New York and in good standing, as trustee, a trust indenture providing for an issue of five year sinking fund seven per cent. secured gold notes, limited, in the aggregate, to three million dollars ($3,000,000) face value, and secured by an amount, par value, of the aforesaid first and refunding general mortgage bonds of the New Corporation at least equal to the amount, par value, of such notes from time to time outstanding under said trust indenture.

"Such trust indenture, and the notes to be issued thereunder, shall be in such form and contain such terms and conditions as counsel for the Rochester Company and the New York Company and the Individual Parties shall approve, and shall follow substantially, so far as appropriately may be, the form of first and refunding general mortgage of the New Corporation."

Third. That the first paragraph, marked "(A)", of section "Third" of said agreement be and the same hereby is [Vol. 497] amended by providing that the sale to and purchase and acquisition by the New Corporation therein referred to shall be upon a date not later than forty (40) months from the date of the Federal-New York Consolidation.

Fourth. That the second paragraph of section "Third" of said agreement be and the same hereby is amended: (1) by inserting after the words "and all the telephone and telegraph lines, plant, property, business and good-will thereof owned, operated or conducted by the Bergen Telephone Company", the following:

"all the telephone and telegraph lines, plant, property, business and good-will thereof owned, operated or conducted by the Nunda Telephone Company; and all the telephone and telegraph lines, plant, property, business and good-will thereof owned, operated or conducted by the Tuscarora Telephone Company";

(2) by inserting after the words, "Bergen Telephone Company", towards the end of said paragraph, the words,

"Nunda Telephone Company and Tuscarora Telephone Company", and (3) by modifying the remainder of said paragraph in conformity with amendment "(2)" contained in section "First" of this supplemental agreement.

Fifth. That the map marked "(A)" and the Schedule marked "A-1", both hereto annexed and made part hereof, are hereby substituted in the place and stead of the map marked "A" and the Schedule marked "A-1" annexed to the aforesaid agreement and referred to in subdivision "(B)" of section "Third" thereof.

Sixth. That section "Fourth" of said agreement be and the same hereby is amended so as to provide as follows:

"Fourth. The considerations to be given by the New Corporation for and on account of the lines, plants, properties, businesses and good-will severally to be conveyed to it as aforesaid, shall be as follows:

"(A) The New Corporation shall pay to the Rochester Company and its nominees, for the properties described [fol. 498] under subdivision "(A)" of section "Third" hereof, a sum in cash equal to the aggregate value, to the New Corporation, of such properties at the time of the closing of title, agreed upon and determined as hereafter in this section and sections "Fifth" and "Sixth" provided, less the face value of the one million and fifty-eight thousand five hundred dollars ($1,058,500) of bonds (and the unpaid interest accrued thereon) issued and outstanding under the aforesaid mortgage of the Rochester Company; or the New Corporation may, at its option, in the place and stead of such amount of cash, issue and deliver bonds under the first and refunding general mortgage by subdivision "(A)" of section "Second" hereof provided to be executed by it of a like amount par value, in full payment for such properties; Provided, However, that, at the option of the Rochester Company, the New Corporation in the place and stead of cash or first and refunding general mortgage bonds, as aforesaid, shall issue and deliver a like amount, par value, of secured gold notes under the trust indenture by subdivision "(B)" of section "Second" hereof provided to be executed by it; Provided, Further, that in either case accrued interest on such bonds or notes shall be adjusted at or as of the date of closing of title;

"And the New Corporation shall, in addition assume and agree to pay the aforesaid one million and fifty-eight thousand five hundred dollars ($1,058,500) face value of the Rochester Company's mortgage bonds, together with the unpaid interest accrued thereon.

"(B) The New Corporation shall issue and deliver to the New York Company in full payment for the property described under subdivision "(B)" of section "Third" hereof, its Preferred Stock to an amount equal, at par, to the aggregate value, to the New Corporation, at the time of the closing of title, of such property, agreed upon and determined as hereinafter in this section and sections "Fifth" and "Sixth" provided; Provided, However, that at the option of the New York Company, the New Corporation, in the place and stead of Preferred Stock shall issue and deliver to the New York Company for and on account of any and all net additions to plant made subsequent to February 29, 1920, an equal amount, par value, of secured gold notes under the trust indenture by subdivision "(B)" of section "Second" hereof provided to be executed by it; accrued interest on such notes shall be adjusted at or as of the date of closing of title.

"The properties described in and provided by section "Third" hereof to be conveyed (exclusive of state and municipal franchises and choses in action, debts, bills, claims, judgments and accounts receivable and exclusive of the properties of the Nunda Telephone Company and the Tuscarora Telephone Company) to the New Corporation, have been inventoried and appraised as of June 30, 1917; thereafter inventories and appraisals were also made of the like properties of the Nunda Telephone Company and the Tuscarora Telephone Company, and subsequently all of said inventories and appraisals were continued and brought up [fol. 499] to the date as of February 29, 1920; based upon the inventories and appraisals so made (identified by the signatures of the parties hereto this day) and subject to correction for manifest errors therein, the parties hereto do now stipulate and agree that for the purposes of this agreement the value to the New Corporation of such properties (as of February 29, 1920) shall be taken and deemed to be the following amounts, namely:

"Those described under subdivision "(A)" of section "Third" hereof, the sum of $1,597,500

"Those described under subdivision "(B)" of section "Third" hereof, the sum of $4,814,000,

and, with such additions thereto or deductions therefrom as may, according to the inventories and appraisals by section "Sixth" hereof provided for, be required to be made to arrive at the values thereof at the time of the closing of title, the amounts above stated (plus an amount equal to the then value of the choses in action, debts, claims, judgments and accounts receivable transferred to the New Corporation) shall be the price to be paid by the New Corporation therefor; provided, the amounts so arrived at be approved by the Public Service Commission of the State of New York, Second District, or its successor in authority, otherwise such considerations shall be in such amounts (provided the basis for such change be applied equally to all the properties involved) as said Commission, or its successor in authority, may determine or as may judicially finally be determined to be the values thereof.

"Such respective consideration shall be paid and delivered by the New Corporation only upon the delivery to it of deeds, conveyances, instruments and documents which shall and will effectively assign, grant, convey and transfer to it, its successors and assigns, good, valid, legal and indefeasible title to the aforesaid respective lines, plants, properties, businesses and good-will, free, except such as are herein provided to be assumed by the New Corporation, from all bills, debts, assessments, taxes, obligations, judgments, mortgages, liens or encumbrances."

Seventh. That section "Sixth" of said agreement be and the same hereby is amended by inserting, after the words "June 30, 1917," at the end of the last paragraph of said section, the words, "and of February 29, 1920,".

Eighth. That section "Fifth" and the paragraph marked "(F)" of section "Ninth" of said agreement be and the same hereby are amended by inserting after the words, "Bergen Telephone Company", the words, "Nunda Telephone Company and Tuscarora Telephone Company".

[fol. 500] Ninth. That in the place and stead of the paragraph marked "(A)" and the second subdivision thereof, of section "Ninth" of said agreement, the following be substituted:

"(A) The Individual Parties shall have satisfied the New York Company that there is a preponderance of public sentiment in the communities served by the Rochester Company, the Interlake (Canandaigua) Telephone Company, the Brockport Telephone Company, the Bergen Telephone Company, the Nunda Telephone Company, the Tuscarora Telephone Company, and by the New York Telephone Company in the territory served by the lines, plant and property provided by subdivision "(B)" of section "Third" hereof to be conveyed to the New Corporation, in favor of the consolidations by this agreement contemplated, and of just, reasonable, sufficient rates, charges or rentals for telephone service and facilities, including, in the Rochester exchange area, a measured service business rate."

Tenth. That the paragraph marked "(E)" of section "Ninth" of said agreement be modified in conformity with amendment "(2)" contained in section "First" of this supplemental agreement.

Eleventh. That section "Eleventh" of the aforesaid agreement be and the same hereby is amended by substituting, in the place and stead of the words following the words, "not exceeding one hundred and fifty thousand dollars ($150,000) face value of" (towards the end of said section), the following:

"either bonds of the New Corporation issued under the first and refunding general mortgage aforesaid, or, at the option of the New York Company, secured gold notes under the trust indenture aforesaid."

Twelfth. That the first paragraph of section "Thirteenth" of said agreement be and the same hereby is amended: (1) by changing the period of two years specified in the third sentence of said paragraph to five years; (2) by omitting the figures: "27, 31, 38 and 39" contained towards the ends of the first and second paragraphs of said section and substituting in place thereof the figures "26 and 28"; and (3) by substituting in the place of the maximum amount of two hundred and twenty-five thousand dollars ($225,000)" and the minimum amount of "one hun-
[fol. 501] dred and forty-five thousand dollars ($145,000)" specified in said section, the amount of one hundred and seventy thousand dollars ($170,000) as such maximum

amount, and the amount of fifty thousand dollars ($50,000) as such minimum amount.

In Witness Whereof, the parties have executed this agreement under seal, in triplicate, and have delivered the same on the day and year first above written.

Signed, sealed and delivered in the presence of:

(Sgd.) George R. Fuller. (L.S.) (Sgd.) W. Roy McCanne. (L.S.) (Sgd.) Frederick W. Zoller. (L.S.) Rochester Telephone Company, by (Sgd.) George R. Fuller, President. (Seal.)

Attest: W. T. Farrell, Secretary.

New York Telephone Company, by (Sgd.) J. A. Stewart, First Vice President and General Manager. (Seal.)

Attest: J. M. Ferry, Asst. Secretary.

Acknowledged at Rochester, N. Y., July 1, 1920 by George R. Fuller, W. Roy McCanne and Frederick W. Zoller.

Acknowledged at Rochester, N. Y., July 1, 1920 by George R. Fuller, as President of Rochester Telephone Company.

Acknowledged at New York City June 29, 1920 by James A. Stewart, as First Vice-President of New York Telephone Company.

[fol. 502] RESPONDENT'S EXHIBIT 7

This Supplemental Agreement, made and entered into at the City of Rochester, N. Y., this first day of May, one thousand nine hundred and twenty-one, by and between George R. Fuller, W. Roy McCanne and Frederick W. Zoller. all of the City of Rochester, N. Y., parties of the first part (hereinafter collectively referred to as the Individual Parties), the Rochester Telephone Company, a corporation of the State of New York, having its principal office at 59 Stone Street, in the City of Rochester, N. Y., party of the second part (hereinafter referred to as the Rochester Company), and the New York Telephone Company, a corporation of the State of New York, having its principal office at 15 Dey Street, Borough of Manhattan, The City of New York, N. Y., party of the third part (hereinafter referred to as the New York Company), Witnesseth:

Whereas, the parties hereto heretofore entered into an agreement in writing, bearing date the twenty-fifth day of February, one thousand nine hundred and eighteen, and into an agreement in writing, supplemental thereto, bearing date the first day of March, one thousand nine hundred and twenty, and desire, in the particulars hereinafter set forth, to supplement and modify the aforesaid agreements:

Now, Therefore, in consideration of the premises, of the sum of one dollar ($1.00), lawful money of the United States, and other valuable considerations, paid by each of the parties hereto to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, each of the parties of the first part, for himself, his heirs, executors, administrators and assigns, and each of the other parties for itself, its successors and assigns, hereby covenants and agrees as follows:

[fol. 503] First. That Section "Second" of said agreement of February 25, 1918, as amended by said supplemental agreement of March 1, 1920, be and the same hereby is amended so as to provide as follows:

Second. The Individual Parties covenant and agree that for the purposes hereinafter provided and the proper corporate purposes of the New Corporation, said New Corporation shall duly make and cause to be executed with a trust company organized under the laws of the State of New York and in good standing, as trustee, a first and refunding mortgage, upon all the lines, plants, properties, businesses and good-will owned by the new corporation, or which it may subsequently acquire, in the sum of ten million dollars ($10,000,000) to secure a series of said amount of bonds maturing not later than twenty-five years after their respective dates, bearing interest at the rates established by the Board of Directors of the New Corporation, payable semi-annually in the City of Rochester and The City of New York. Such mortgage shall be a first lien upon all the lines, plants, properties, businesses and good-will of the New Corporation, including (other than those acquired by it from the Rochester Company) all the lines, plants, properties, businesses and good-will acquired by it in accordance with the terms of this agreement, and a lien upon the lines, plant, property, business and good-will acquired by it from the Rochester Company, subject and subordinate only to the

present issued and outstanding mortgage bonds of the Rochester Company, which the Individual Parties covenant and agree does not and shall not at any time exceed the sum of one million and fifty-eight thousand five hundred dollars ($1,058,500) face value, viz: said amount, face value, of bonds issued and outstanding under the mortgage, dated December 31, 1903, made by the Rochester Company to said Rochester Trust & Safe Deposit Company, as Trustee. Provision shall be made in the aforesaid first and refunding mortgage to be executed by the New Corporation as aforesaid, for the exchange, dollar for dollar, of five per cent. bonds to be issued under said new mortgage for the bonds issued and outstanding under the aforesaid mortgage of the Rochester Company.

Such first and refunding mortgage, and the bonds to be issued thereunder, shall be in such form and contain such terms and conditions as counsel for the Rochester Company and the New York Company and the Individual Parties shall approve, and shall follow substantially the revised form of the mortgage recently filed with the Public Service Commission.

Second. That the first paragraph, marked "(A)", of section "Third" of said agreement of February 25, 1918, as amended by said supplemental agreement of March 1, 1920, be and the same hereby is amended by providing that the sale to and purchase and acquisition by the New Corporation [fol. 504] therein referred to shall be upon a date not later than forty-four (44) months from the date of the Federal-New York Consolidation.

Third. That the paragraph marked "(A)" and the two following paragraphs of section "Fourth" of said agreement of February 25, 1918, as amended by said supplemental agreement of March 1, 1920, be and the same hereby are amended so as to provide as follows:

(A) The New Corporation shall pay to the Rochester Company and its nominees, for the properties described under subdivision "(A)" of section "Third" hereof, a sum in cash equal to the aggregate value, to the New Corporation, of such properties at the time of the closing of title, agreed upon and determined as hereafter in this section and sections "Fifth" and "Sixth" provided, less the face value

of the one million and fifty-eight thousand five hundred dollars ($1,058,500) of bonds (and the unpaid interest accrued thereon) issued and outstanding under the aforesaid mortgage of the Rochester Company; or the New Corporation may, at its option, in the place and stead of such amount of cash, issue and deliver First and Refunding Mortgage 5% Gold Bonds, Series B, under the First and Refunding Mortgage by section "Second" hereof provided to be executed by it of a like amount par value, in full payment for such properties; Provided, However, that, at the option of the Rochester Company, the New Corporation, in the place and stead of First and Refunding Mortgage 5% Gold Bonds, Series B, as aforesaid, shall issue and deliver to the Rochester Company for and on account of any and all net additions to plant made subsequent to February 29, 1920, an equal amount, par value, of First and Refunding Mortgage Gold Bonds, Series A, under said First and Refunding Mortgage; Provided, Further, that in either case accrued interest on such bonds shall be adjusted at or as of the date of closing of title;

And the New Corporation shall, in addition, assume and agree to pay the aforesaid one million and fifty-eight thousand five hundred dollars ($1,058,500) face value of the Rochester Company's mortgage bonds, together with the interest subsequently accruing thereon.

(B) The New Corporation shall issue and deliver to the New York Company in full payment for the property described under subdivision "(B)" of section "Third" hereof, its Preferred Stock to an amount equal, at par, to the aggregate value, to the New Corporation, at the time of the closing of title, of such property, agreed upon and determined as hereinafter in this section and sections "Fifth" and "Sixth" provided; Provided, However, that at the option of the New York Company, the New Corporation, in the place and stead of Preferred Stock shall issue and deliver to the New York Company for and on account of any and all net additions to plant made subsequent to February 29, 1920, an equal amount, par value, of First and Refund- [fol. 505] ing Mortgage Gold Bonds, Series A, under the aforesaid First and Refunding Mortgage, by section "Second" hereof provided to be executed by it; accrued interest on such notes shall be adjusted at or as of the date of closing of title.

Fourth: That section "Eleventh" of said agreement of February 25, 1918, as amended by said supplemental agreement of March 1, 1920, be and the same hereby is amended so as to provide as follows:

Eleventh: If and as soon as each and every one of the foregoing terms, conditions and provisions have been completely fulfilled and complied with, the New York Company agrees on the demand of the New Corporation to purchase from the New Corporation and pay for at such price as the Public Service Commission of the State of New York, Second District, or its successor in authority, may authorize the New Corporation to sell the same for the purpose of furnishing the New Corporation with working capital, not exceeding one hundred and fifty thousand dollars ($150,000) face value of First and Refunding Mortgage Bonds, Series A, of the New Corporation issued under the First and Refunding Mortgage aforesaid.

In Witness Whereof, the parties have executed this agreement under seal, in triplicate, and have delivered the same on the day and year first above written.

Signed, sealed and delivered in the presence of:

(Sgd.) George R. Fuller. (L. S.) (Sgd.) W. Roy McCanne. (L. S.) (Sgd.) Frederick W. Zoller. (L. S.) Rochester Telephone Company, by (Sgd.) George R. Fuller, President. (Seal.)

Attest: F. J. Brookman, Secretary.

New York Telephone Company, by H. F. Thurber, President. (Seal.)

Attest: J. M. Ferry, Asst. Secretary.

[fol. 506] Acknowledged at Rochester, N. Y., July 20, 1921 by George R. Fuller, W. Roy McCanne and Frederick W. Zoller.

Acknowledged at Rochester, N. Y., July 20, 1921 by George R. Fuller, as President of Rochester Telephone Company.

Acknowledged at New York City July 15, 1921 by Howard F. Thurber, as President of New York Telephone Company.

[fol. 507] RESPONDENT'S EXHIBIT 8

Address Reply to "The Attorney General" and refer to Initials and Number.
143339-111-17

Department of Justice, Washington, D. C.

January 11, 1918.

N. C. Kingsbury, Esq., Vice Pres., American Telephone & Telegraph Co., 195 Broadway, New York, N. Y.

DEAR SIR:

The Department has duly considered your letter of November 9, 1917, and the data submitted by you relative to a series of proposed purchases and sales of telephone exchanges located in the western portion of New York State, i.e., at Buffalo, Rochester, and Jamestown, and other places commercially tributary to these three large centers.

The material facts are represented in the correspondence and accompanying data to be as follows:

Telephone service is now furnished in Buffalo and vicinity by the New York Telephone Company (Bell) and by the Federal Telephone & Telegraph Company (Independent); Rochester and vicinity are served by the New York Telephone Company and by the Rochester Telephone Company (Independent); Jamestown and vicinity are served by the New York Telephone Company and by the Home Telephone Company (Independent). At Buffalo the stations of the New York Company largely outnumber those of the independent company; in the Rochester area the Bell and Independent subscribers are approximately equal in number; and in the Jamestown district the Independent subscribers slightly outnumber the Bell.

The Federal Company, which has been operating in Buffalo since 1909, at which time it took over the telephone properties formerly operated by the Frontier Telephone Company, is unable because of its financial condition to continue as an independent going concern.

[fol. 508] To relieve the Federal Company and at the same time provide single systems of telephone service in each of the three districts in question, it is proposed—

1. That the Federal Company (Independent) shall sell its exchange properties in Buffalo and vicinity to the New York Company (Bell).

2. That the Rochester Telephone Company (Independent) and the New York Company (Bell) shall both sell their exchanges in Rochester and vicinity to a new independent company which is to be organized, managed, and controlled by local Rochester men and known as the Rochester Telephone Corporation or by some similar name;

3. That the Home Telephone Company (Independent) and the New York Telephone Company (Bell) shall both sell their exchanges in Jamestown and vicinity to a new independent company which is to be organized, managed, and controlled by local Jamestown men and known as the Jamestown Telephone Corporation or by some similar name.

The Federal Company and Bert G. Hubbel, as parties of the first part, and the New York Company, as party of the second part, have entered into an agreement dated April 15, 1916, a copy of which you have submitted to the Department, which sets forth in detail the terms of the proposed purchase of the Federal Company's property by the New York Company. You also submit tentative agreements which have been drawn but not executed covering the details of the proposed consolidations at Jamestown and Rochester, and state that these agreements are conditioned upon the carrying out of the terms of the contract between the New York and Federal companies.

It is stated that the plan contemplates the acquisition by the New York Telephone Company (Bell) of approximately 32,570 telephone stations, and the acquisition by the two independent companies of 35,895 telephone stations, thus reducing the comparative number of stations owned by the New York Company by approximately 3,300; that at the [fol. 509] same time there will be eliminated in the territory affected approximately 15,300 duplicate stations; that no existing interstate connections are to be disturbed in any way, but that whereas there is now available to independent toll lines in the territory affected connection with only 87,963 stations, the independent subscribers will have, under the changed conditions, provided for in the plan, connection with some 235,588 stations in that territory.

These salient features of the plan are formulated in the joint statement submitted by the Federal Telephone & Telegraph Company, the Rochester Telephone Company, the Home Telephone Company of Jamestown, and the New York Telephone Company, entitled "Outline of the unsatisfactory telephone conditions now existing in western New York and a plan for remedying them", dated October 5, 1917, as follows:

1. That in Rochester and its tributary districts both the Bell and Independent companies shall sell all of their exchange plants to a new Independent telephone corporation to be organized, that corporation to be known as the Rochester Telephone Corporation. In it the Bell Company to have not to exceed one-third of the common voting stock.

2. That in Jamestown and its tributary districts both the Bell and Independent company shall sell all of their exchange plants to a new independent corporation to be organized, that corporation to be known as the Jamestown Telephone Corporation. In it the Bell company shall have not to exceed one-third of the common voting stock.

3. That the telephone system of the Federal Telephone & Telegraph Company, of Buffalo, with its tributary districts, shall be consolidated with the New York Telephone Company.

4. That all Independent telephone companies within the area, affected, which for any reason do not enter into the proposed plan, shall be given telephone connections with the unified system, as proposed, so that all of their subscribers shall have connection with all of the subscribers of the unified system.

5. That all existing toll lines of Independent companies, crossing the state line between the State of New York and the State of Pennsylvania, shall remain in the ownership of Independent Telephone Companies.

6. That all toll lines in the district shall be so operated as to accord to all subscribers of either telephone connection with all the subscribers of both.

7. That all interstate long distance business heretofore accorded the Independent companies of other states shall

be preserved and that all such companies shall in addition thereto be accorded connection with all the subscribers of both Bell and Independent companies within the area affected.

8. That such plan does not involve the transfer either to or from the Bell system or the Independent companies of any property not located wholly within the State of New York.

It is further represented that a preponderance of local [fol. 510] public sentiment has been secured in favor of the plan. This public approval is evidenced by the favorable vote of a large majority of the subscribers of the different companies in the areas concerned, by unanimous vote of the Buffalo City Council (September 29, 1916) authorizing the Buffalo transaction, by referendum vote of the qualified voters of Buffalo at the general election held November 7, 1916, sustaining the action of the City Council, also by the favorable vote of the Buffalo Chamber of Commerce and other representative commercial bodies in the districts affected, and by an approving resolution of the Western Pennsylvania Independent Telephone Association adopted October 20, 1917, and a statement favoring the plan signed by members of the executive committee of Eastern Traffic Association, these two associations representing independent telephone interests in the State of Pennsylvania.

Pursuant to the established practice in such cases, the Department notified the United States Independent Telephone Association of the proposed sales and purchases, so that it might enter complaint if so advised. The association has notified the Department that at meetings held November 17, and December 8, 1917, the board of directors instructed the officers of the association to take no action against the consummation of the proposed transaction if they are carried out according to the contracts submitted, stating that this attitude on its part is based mainly upon the financial condition of the Federal Telephone & Telegraph Company.

Of course the Department cannot undertake either to approve or disapprove these proposed transactions in the sense of determining whether they would or would not violate any law of the United States, since that is a judicial question, and its determination might, moreover, be affected

by other transactions not now before the Department. However, as the commitment of the American Telephone & Telegraph Company expressed in its letter to the Attorney General dated December 19, 1913, was formulated in conference with the Attorney General, it is proper to say that, [fol. 511] assuming the facts and conclusions stated in your letter of November 9, 1917, and disclosed by the other data submitted, to be accurate and complete in all respects, especially the representation that because of its insolvent condition the Federal Company could not in any event continue as a going concern, the proposed plan for readjustments at Buffalo, Rochester and Jamestown and in the tributary districts, taken by itself, would not in the opinion of the Department be contrary to that commitment.

Respectfully, for the Attorney General, (Sgd.) G. Carroll Todd, Assistant to the Attorney General.

[fol. 512] RESPONDENT'S EXHIBIT 9

Hearing Before Federal Communications Commission

Ward & Paul, Official Reporters

January 16, 1918.

Hon. The Attorney General, Department of Justice, Washington, D. C.

SIR:

I wish to acknowledge your favor of the 11th instant, (initials GCT-c-h, number 143339-111-17), which refers to a series of proposed purchases and sales of telephone exchanges located in the western portion of New York State, i. e., at Buffalo, Rochester and Jamestown and other places commercially tributary to these three centers.

I have noted your letter carefully, and in view of its contents and the facts in this case have advised the New York Telephone Company that it may proceed with the execution of the proposed transactions in accordance with the agreements pertaining thereto which were submitted to you with our letter of November 9, 1917.

Respectfully, N. C. Kingsbury, Vice President.

[fol. 513] RESPONDENT'S EXHIBIT 10

Certificate of Incorporation of Rochester Telephone Corporation

[fol. 514] We, the undersigned, all being persons of full age, and citizens of the United States, and at least one of us a resident of the State of New York, desiring to become a corporation, for the purpose of purchasing the plants and properties of the Rochester Telephone Company and the New York Telephone Company, within the territory hereinafter described, and of maintaining and operating the same, and for the purpose of constructing, owning, using and maintaining lines of electric telegraph and telephone wholly within the limits of the State of New York, under and by virtue of the provisions of Article IX of the Transportation Corporations Law of the State of New York, and of other Laws applicable to such a corporation, do hereby declare and certify as follows:

First. The name of the corporation is to be "Rochester Telephone Corporation".

Second. The general route and routes of the lines of such corporation and the points to be connected shall be in, upon, [fol. 515] along, over, under, through and across the public roads, streets, avenues, highways and other places and waters of the City of Rochester, Monroe County, New York, from or to any point or points in said City of Rochester; thence in, upon, along, over, under, through and across the public roads, streets, avenues, highways and other places, rivers, lakes and waters of that portion of the State of New York included within the Counties of Monroe and Livingston; the Towns of Ontario, Walworth and Macedon in Wayne County; the Towns of Manchester, Hopwell, Gorham, Farmington, Canandaigua, Victor, East Bloomfield, West Bloomfield, Richmond, Bristol, South Bristol, Canadice and Naples in Ontario County; the Towns of Middlesex, Potter and Italy in Yates County; the Towns of Prattsburg, Cohocton, Wayland, Dansville, Fremont and Avoca in Steuben County; the Towns of Burns, Grove, Granger, Hume and Centerville in Allegany County; the Towns of Eagle, Wethersfield, Orangeville, Attica, Pike, Gainesville, Warsaw, Middlebury, Covington, Perry, Castile and Genesee Falls in Wyoming County; the Towns of Alexander,

Bethany, Pavilion, Stafford, LeRoy, Byron and Bergen in Genessee County, and the Towns of Kendall, Murray and Clarendon in Orleans County, in the State of New York, from or to any point or points within the aforesaid territory, and in, upon, along, over, under, through and across the public roads, streets, avenues, highways and other places, [fol. 516] rivers, lakes and waters of each of the Cities, Towns and Villages within the aforesaid territory, from or to any point or points therein, for the purpose of connecting the exchanges and sub-exchanges of the corporation, and the residences, offices, factories, buildings, premises, works, places of business and places of amusement and other places and points in said territory, and the terminals of other lines of telegraph and telephone leading to points and places within and outside of the territory hereinbefore described.

Third. The amount of the capital stock of such corporation is to be Seven Million Dollars ($7,000,000), consisting of Seventy thousand (70,000) shares, of the par value of One Hundred Dollars ($100) each, of which One Hundred Thousand Dollars ($100,000), consisting of one thousand (1,000) shares, of the par value of One Hundred Dollars ($100) each, shall be common stock, and Six Million Nine Hundred Thousand Dollars ($6,900,000), consisting of sixty-nine thousand (69,000) shares, of the par value of One Hundred Dollars ($100) each, shall be preferred stock.

The preferred stock shall be entitled to preference and priority over the common stock in the following manner, to wit:

The preferred stock shall have the right to receive annual dividends at the rate of five per cent (5%), payable semi-annually on the first days of July and January (or at such [fol. 517] other dates as may be determined by the Board of Directors) in each and every year, out of the earnings of said corporation in preference to any dividends upon the common stock; such dividends shall, except as hereinafter restricted, be cumulative, so that any deficiency in the five per cent (5%) dividends to be paid on said preferred stock shall, except as hereinafter restricted, be made good out of the earnings of subsequent years before any dividends shall be paid upon the common stock, provided, that up to the close of the second fiscal year following the first issuance of preferred stock (whether of the whole or only part of the authorized amount of the preferred stock) such dividends

shall not be cumulative, and that for the third fiscal year following such issuance the dividends shall be cumulative only as to three per cent (3%) and for the fourth fiscal year only as to four per cent (4%), and thereafter to the full amount of five per cent (5%), the fiscal year of the new corporation to be the calendar year, provided, that if the first issuance of preferred stock be made prior to April first the balance of the calendar year in which such issue is made shall be deemed to be the first fiscal year for the purposes aforesaid, but, if made after April first, the first fiscal year, for the purposes aforesaid, shall not be deemed to begin until the first day of January following such first issue of preferred stock.

[fol. 518] After the payment or declaration, for or in any calendar year, of the annual dividend upon the preferred stock, together with all accumulations, as hereinbefore provided, the common stock may receive and be paid a dividend of not exceeding five per cent (5%), and if there then remain additional surplus earnings or net profits, the preferred stock shall participate pro rata with the common stock in any further dividends for or in such calendar year which may be declared up to an additional dividend of three per cent (3%).

The preferred stock shall be entitled to be repaid to the full extent of its par value upon any distribution of the assets of the corporation, in the event of insolvency or dissolution, before any distribution of capital shall be made to the common stock, and shall share pro rata with the common stock in any surplus assets remaining after the common stock has been repaid to the full extent of its par value on any such distribution.

The holders of the preferred stock shall have equal voting power with the common stock, except that they shall be without power to vote at any meetings of the stockholders of the corporation held for the purpose of electing directors or for the adoption or amendment of the By-Laws of the corporation, unless and until any time after the close of the second fiscal year (as hereinbefore defined) following the first issuance of preferred stock (whether of the whole or [fol. 519] only part of the authorized amount of preferred stock) the corporation has failed (in which event it shall forthwith come into full voting power) to pay out of earnings dividends upon all of the issued and outstanding pre-

ferred stock at the rates provided to be cumulated as aforesaid, that is to say, three per cent (3%) for the third fiscal year, four per cent (4%) for the fourth fiscal year, following the first issuance, as aforesaid, of preferred stock, and five per cent (5%) per annum thereafter.

No vote or consent of the stockholders upon any question of consolidation with any other corporation, or of the lease, sale or conveyance of any of the property, rights, privileges or franchises of the corporation, made otherwise than in the ordinary course and conduct of its business, or of the increase or reduction of the capital stock of the corporation, (or of the issuance of preferred stock other than in this certificate provided,) or of the guaranteeing of bonds of any other corporation, or of the alteration or amendment of this certificate (which matters are now provided for by section one hundred and four (104) of the Transportation Corporations Law, sections six (6), eight (8), eighteen (18), sixty-one (61) and sixty-two (62) to sixty-four (64) of the Stock Corporation Law) shall be or become effective for any purpose whatsoever unless concurred in by the affirmative vote or consent of at least eighty (80) per cent of the then issued and outstanding common stock of the corporation.

[fol. 520] Each stockholder entitled to vote at meetings held for the election of directors shall be entitled to as many votes as shall equal the number of his voting shares of stock multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit.

Fourth. The term of existence of such corporation shall be perpetual.

Fifth. The number of directors of such corporation shall be fifteen (15). The directors of such corporation need not be stockholders therein.

There shall be an Executive Committee of the Board of Directors of five (5) directors, who shall be elected annually at a meeting of the Board of Directors; at every such election each director shall be entitled to five (5) votes, and he may cast all of such votes for a single director for the Executive Committee, or he may distribute them among the number to be voted for, or any two or more of them as he may see fit. Subject to such limitations and regulations as

may be provided by the By-Laws or as may otherwise be prescribed by law or by the Board of Directors, the Executive Committee shall have and exercise all the powers of the Board of Directors in the intervals between the meetings of the Board.

[fol. 521] Sixth. The names and residences of the directors for the first year are as follows:

Names	Residences
George R. Fuller	Rochester, New York,
Fred. C. Goodwin	" " "
W. Roy McCanne	" " "
Frederick W. Zoller	" " "
J. Foster Warner	" " "
John Craig Powers	" " "
Carl F. Lomb	" " "
Thomas E. Lannin	" " "
Frank T. Sage	" " "
T. Carl Nixon	" " "
Tage P. Sylvan	Montclair, New Jersey,
Hiram F. Stevens	Greenwich, Connecticut,
Charles A. Spaulding	Buffalo, New York,
Peter O. Jacobs	" " "
William B. Woodbury	Columbus, Ohio.

Seventh. The Post Office addresses of the subscribers to this certificate, and the number of shares (to be common stock) which each agrees to take in the corporation are as follows:

[fol. 522]

Names	Post Office addresses	No. of shares subscribed
George R. Fuller	Rochester, New York	10
Fred. C. Goodwin	" " "	10
W. Roy McCanne	" " "	10
Frederick W. Zoller	" " "	10
J. Foster Warner	" " "	10
T. Carl Nixon	" " "	10
Tage P. Sylvan	Montclair, New Jersey	10
Hiram F. Stevens	Greenwich, Connecticut	10
Charles A. Spaulding	Buffalo, New York	10

Eighth. The corporation may purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebt-

edness of any corporation, domestic or foreign, and may issue in exchange therefor its stocks, bonds or other obligations to the extent permitted by and subject to the Laws governing corporations of like character.

Ninth. The corporation shall also be authorized and empowered, to the extent permitted by and subject to the Laws governing corporations of like character,—

(a) To take, hold, own, lease, purchase, acquire, sell, convey, transfer, mortgage, let and dispose of, real and personal estate or interests or rights therein, without limit as to amount:

(b) To construct, maintain, purchase, acquire, manufac- [fol. 523] ture, operate, sell, mortgage, pledge, let, hire, furnish and deal in and with telegraph and telephone instruments, wires, cables, poles, ducts, conduits, and all kinds of works, property, machinery, apparatus, corveniences, appliances, devices, and things which are or may be capable of being used in connection with the conduct and operation of any of its powers, purposes and business;

(c) To apply for, purchase, or in any manner acquire, lease, hold, own, use and operate, and to sell, grant, let, mortgage, pledge, or in any manner dispose of, licenses or other rights in respect of, and in any manner to deal in and with any and all rights, inventions, improvements and processes used in connection with or secured under letters patent or copyrights of the United States or other countries, or otherwise, and to work, operate, manufacture, develop, sell, grant and let the same;

(d) To carry on, promote, conduct and transact any business or businesses of a similar character connected directly or indirectly with the telegraph, telephone or kindred businesses or capable of being carried on in connection therewith, or which may be useful or convenient in connection [fol. 524] with the powers, purposes or business of such corporation.

In Witness Whereof, we have made, executed and acknowledged this certificate in triplicate, this 14th day of February, 1920.

George R. Fuller. Fred. C. Goodwin. W. Roy McCanne. Frederick W. Zoller. J. Foster Warner. T. Carl Nixon. Tage P. Sylvan. Hiram F. Stevens. Charles A. Spaulding.

[fol. 525] STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

On this 14th day of February, 1920, before me, the subscriber, personally appeared George R. Fuller, Fred C. Goodwin, J. Foster Warner, and T. Carl Nixon, to me personally known to be the same persons described in and who executed the foregoing instrument, and they severally duly acknowledged to me that they executed the same.

Helen A. Keefe, Notary Public, Monroe County, N. Y. (Seal.)

STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

On this 14th day of February, 1920, before me, the subscriber, personally appeared W. Roy McCanne and Frederick W. Zoller, to me personally known to be the same persons described in and who executed the foregoing instrument, and they severally duly acknowledged to me that they executed the same.

Helen A. Keefe, Notary Public, Monroe County, N. Y. (Seal.)

[fol. 526] STATE OF NEW YORK,
County of New York,
City of New York, ss:

On this 17th day of February, 1920, before me, the subscriber, personally appeared Tage P. Sylvan and Hiram F. Stevens, to me personally known to be the same persons described in and who executed the foregoing instrument, and they severally duly acknowledged to me that they executed the same.

Lincoln Jones, Notary Public, Kings Co. No. 2. Cert. filed in N. Y. Co. No. 4. (Seal.)

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

On this 20 day of February, 1920, before me, the subscriber, personally appeared Charles A. Spaulding, to me personally known to be one of the same persons described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

P. W. Huffenstern, Notary Public Erie Co.

[fol. 527] RESPONDENT'S EXHIBIT 11

By-Laws of Rochester Telephone Corporation

[fol. 528] Rochester Telephone Corporation

Place of Stockholders' Meetings

Article 1. All meetings of the stockholders shall be held at the principal office of the corporation in the City of Rochester, N. Y. All such meetings may be adjourned by the stockholders to any other place in said city.

Annual Meeting of Stockholders

Article 2. There shall be an annual meeting of the stockholders of the corporation on the third Wednesday in February in each year, at eleven o'clock in the forenoon (unless such day be a legal holiday, in which case the meeting shall be held at the same hour on the next day following that is not a legal holiday), for the election of fifteen directors and the transaction of such other business as may then properly come before the stockholders.

Special Meetings of Stockholders

Article 3. A special meeting of the stockholders may be called by the directors or by the president at any time, and the president shall call a special meeting whenever he is requested in writing to do so by two of the directors or by stockholders representing either one-third of the common stock or one-third of the preferred stock.

[fol. 529] Quorum of Stockholders

Article 4. At any meeting of the stockholders, persons representing, in person or by proxy, a majority of all the shares of the corporation outstanding and entitled to vote thereat, shall be necessary to constitute a quorum.

Notices of Stockholders' Meetings

Article 5. A written or printed notice of the time and place of every annual meeting and of the time, place and purpose of every special meeting of the stockholders shall be given by the secretary, by delivery of, or by mailing, such notice to each and every stockholder entitled to vote thereat.

addressed to him at his place of business, or such address as may appear on the books of the corporation, at least five days before the time named for the meeting, and in such other manner, if any, as may be prescribed by law.

Officers and Elections

Article 6. The officers of the corporation shall consist of a president, one or more vice-presidents, a secretary, and a treasurer, who shall continue in office for one year and until their successors are chosen and have qualified.

There shall be fifteen (15) directors, who shall be chosen by the stockholders, by ballot, at the annual meeting, or at any meeting held in lieu of the annual meeting for that purpose, and who shall hold office for one year and until their successors are elected and have qualified.

The president, vice-president, and each vice-president, if there be more than one, secretary, and treasurer shall be chosen by the directors at the stated meeting held after the [fol. 530] annual meeting of the stockholders, or at any meeting of the directors held in lieu of such stated meeting for that purpose.

Inspectors of Election

Article 7. Two inspectors of election shall be chosen at the annual meeting of the stockholders to act as such at that meeting of stockholders for the election of directors and until their successors are chosen.

Power of Directors

Article 8. The Board of Directors shall have and take entire general charge and supervision of all the business of the corporation. They may appoint a chairman of the board, fill any vacancy or vacancies occurring in their number, and may appoint, and, subject to the provision of the by-laws, prescribe the duties of a general manager, a general auditor, and such other officers, agents or factors as, in the judgment of the directors, may be necessary. Any officers, agents or factors so appointed shall be removable at the pleasure of the directors, and any vacancy in any office may be filled by the board.

The board of directors shall, at their first meeting after the annual meeting of the stockholders; elect an executive

committee, consisting of five directors. At every such election each director shall be entitled to five (5) votes, and he may cast all of such votes for a single director for the executive committee, or he may distribute them among the number to be voted for, or any two or more of them, as he may see fit. Each director so elected to the executive committee by the board of directors may designate, in writing, another director, not already a member of the executive committee, as his alternate to act as a member of the executive com- [fol. 531] mittee in his (the principal's) absence or inability to act; upon the death or resignation of his principal, the alternate shall become the principal and shall similarly designate his alternate.

Place of Meetings of Directors

Article 9. All meetings of the board of directors shall be held at the principal office of the corporation in the City of Rochester, New York, or such other place in the State of New York as may be designated in the notice of the meeting.

Stated Meetings of Directors

Article 10. A stated meeting of the board of directors shall be held as soon as practicable, but not later than thirty (30) days after the annual meeting of the stockholders, and thereafter stated meetings shall be held on such dates as the board, by vote, may from time to time determine.

Quorum of Directors

Article 11. At any meeting of the board of directors, a majority of the whole board shall constitute a quorum.

Special Meetings of Directors

Article 12. Special meetings of the board of directors may be called by the president whenever he may think proper, and he shall call such meeting whenever requested, in writing, to do so by any two of the directors.

Notice of Directors' Meetings

Article 13. A written or printed notice of the time and place of every stated meeting, and of the time, place and object of every special meeting of the board of directors [fol. 532] shall be given by the secretary, by delivery of, or

by mailing, such notice to each and every director, addressed to him at his usual place of business or such address as may appear on the books of the corporation, at least five days before the time named for the meeting.

The first meeting of the board of directors after the annual meeting of the stockholders, as provided in Article 10, may be held immediately after such annual meeting without notice to the directors, provided a majority of the members-elect be present, and that any action taken at such meeting shall be by a majority vote of the whole board.

Powers of Executive Committee

Article 14. Subject to such limitations and regulations as may be prescribed by the by-laws or by the board of directors, the executive committee shall have and exercise all the powers of the board of directors in the intervals between the meetings of the board, other than the powers to appoint a chairman of the board of directors, or fill any vacancy or vacancies occurring in the board of directors.

Quorum of Executive Committee

Article 15. At any meeting of the executive committee, a majority of the members of such committee shall be present to constitute a quorum, but no action of the committee shall be effective unless concurred in by a majority of the entire committee.

Regular Meetings of Executive Committee

Article 16. The executive committee may fix the time and place of holdings its regular meetings and after such time and place shall have been fixed, no notice of such regular meetings shall be necessary.

[fol. 533] Special Meetings of Executive Committee

Article 17. Special meetings of the executive committee may be called by the president whenever he shall think proper, and he shall call such meetings wherever requested, in writing, to do so by two members (either principal or alternate) of the executive committee.

A written or printed notice of the time, place and object of every special meeting of the executive committee shall

be given by the secretary, by delivery of, or by mailing, such notice to each member and alternate member of the executive committee addressed to him at his usual place of business or such address as may appear on the books of the corporation, at least three days before the time named for the meeting.

President

Article 18. The president shall perform such duties as usually pertain to the office and also such as may be assigned to him by the board of directors or executive committee.

Vice-President

Article 19. The vice-president and each vice-president, if there be more than one, shall have such powers and perform such duties as usually pertain to the office, and also such as may be assigned to him by the board of directors, the executive committee, or the president.

Secretary

Article 20. The secretary shall give the necessary notices of all meetings of the stockholders, board of directors and executive committee. He shall keep and record the proceedings of all meetings of the stockholders, board of directors [fol. 534] and executive committee, and shall keep such books or records as the board of directors or executive committee may direct. He shall affix the corporate seal, when authorized, and generally shall perform such services and duties as the board of directors or executive committee may, from time to time prescribe.

Treasurer

Article 21. The treasurer shall receive and have charge of all funds, negotiable bonds, and securities of the corporation; he shall deposit the funds to the credit of the corporation in such bank or trust companies as the board of directors or executive committee shall direct, and he shall disburse the same only under such rules and regulations as the board of directors or the executive committee may, from time to time, adopt.

He shall give bond for the faithful discharge of his duties in such sum and with such sureties as the board of directors or executive committee shall approve, which bond shall remain in the custody of the president.

He shall keep an account of all receipts and disbursements, and make such reports as may be required by the board of directors or executive committee.

Certificate of Stock

Article 22. Certificates shall be issued in the manner prescribed by law to each stockholder, showing the number of shares of stock to which he is entitled, and said certificates and the shares named therein shall be transferable upon the books of the corporation by the shareholder named in the certificate, or his duly authorized attorney or representative. [fol. 535] No new certificate of any share shall be issued until the old certificate representing the same has been surrendered and canceled, provided, however, that in case of a lost certificate a duplicate certificate may be issued upon such conditions as the board of directors or executive committee may prescribe.

Dividends and Finances

Article 23. Dividends shall be declared and paid out of the surplus profits of the corporation as often and at such times as the board of directors may determine.

The funds of the corporation shall be deposited in its name in such banks or trust companies as the board of directors or the executive committee may, from time to time, designate. All checks, notes, drafts and other negotiable instruments shall be signed and countersigned by such officers of the corporation as the board of directors or the executive committee may, from time to time, by resolution determine. (See Note.)

Corporate Seal

Article 24. The seal of the corporation shall be circular in form with the words "Rochester Telephone Corporation, Rochester, N. Y., Incorporated 1920," and such seal as is impressed on the margin hereof is hereby adopted as the corporate seal of the corporation.

Changes of By-Laws

Article 25. These by-laws may be altered or amended at any duly called meeting of the stockholders by a majority vote of the shares entitled to vote owned by those present in person or represented by proxy at such meeting or at any

meeting of the board of directors by a majority vote of the whole number of directors, provided that in the call for such meeting notice shall have been given that a proposition to [fol. 536] amend the by-laws will be submitted.

NOTE.—Article 23 amended as of August 26, 1927.

[fol. 537] Amendments

Article 23 amended August 26, 1927, by Board of Directors, by adding the following:

"except that payroll checks, that is checks drawn in payment of the weekly or monthly wages of employees, may, if authorized by resolution of the Board of Directors or Executive Committee, and subject to such conditions and limitations as such Board or Committee may, from time to time, prescribe, be signed by the fac-simile signature of any officer designated by resolution of the Board of Directors or Executive Committee."

[fol. 538] RESPONDENT'S EXHIBIT 12

Rochester Telephone Corporation

Rochester, New York

Voting Trust Agreement

By and Between Subscribing Stockholders, Voting Trustees, and Depositary

Dated, August 1, 1926

NOTE.—Pursuant to the provisions of paragraph "Tenth" of the within agreement.

J. Foster Warner was appointed successor to Geo. R. Fuller by instrument dated June 20, 1927 and filed with the Depositary.

John P. Boylan was appointed successor to W. Roy McCanne by instrument dated Nov. 21, 1934 and filed with the Depositary.

The Voting Trustees, as of this date, are therefore

Fred C. Goodwin,
J. Foster Warner,
John P. Boylan.

T. C. N.

January 23, 1935.

[fol. 539] Rochester Telephone Corporation

Voting Trust Agreement

This Agreement, entered into as of the first day of August, 1926, by and between such stockholders of the Rochester Telephone Corporation, a corporation organized under the Laws of the State of New York, and having its office and principal place of business in the City of Rochester, Monroe County, New York, hereinafter called the "Company", as may become parties hereto in the manner provided, hereinafter called the "Stockholders", parties of the first part, and George R. Fuller, W. Roy McCanne, and Fred C. Goodwin, hereby constituted Voting Trustees, representing such Stockholders, hereinafter called "Voting Trustees", parties of the second part, and Lincoln-Alliance Bank, of Rochester, New York, as agent for the Voting Trustees, hereinafter called the "Depositary", party of the third part. Witnesseth:

Whereas, the stockholders deem it to be essential to the continued and permanent success of the Company and for the best interests of all the stockholders that the Company shall be managed and directed for a period of at least ten (10) years under a definite and fixed policy and that a voting trust should be created as herein provided:

[fol. 540] Now, Therefore, the Stockholders, in consideration of the premises and for other good and valuable considerations, severally agree each with the other and with the Voting Trustees and with the Depositary, as follows:

First. The several stockholders who are or may become parties hereto shall forthwith deposit with the Depositary certificates for the number of shares of the common capital stock of the Company which they may severally own when this agreement becomes effective as hereinafter provided, as shown by the stock books of the Company with assignments and irrevocable powers of attorney for the transfer thereof, duly executed in blank, and with such transfer tax stamps as may be required for the transfer thereof. The stock deposited hereunder shall be transferred to and under certificates therefor issued in the names of the Voting Trustees and such certificates shall be deposited with the Depositary. The Voting Trustees are hereby empowered to cause all transfers to be made which may become necessary by reason of any change in the person or persons

holding the office of Voting Trustees hereunder, as provided herein; and the Depositary is authorized and directed to surrender all certificates deposited hereunder, with the assignment thereof and powers of attorney, permitting the transfer thereof, for the purpose of permitting all such transfers to be made.

Second. The Voting Trustees do hereby promise and [fol. 541] agree with the Stockholders and with every holder of stock trust certificates issued as hereinafter provided, that from time to time, upon request, they will cause to be issued and delivered to the several stockholders, in respect of all stock deposited by them with the Depositary, stock trust certificates to an aggregate amount equal to the amount of all stock so deposited, which stock trust certificates shall be signed by the Depositary as the agent of the Voting Trustees, and which certificates shall be in substantially the following form:

"Rochester Telephone Corporation

Stock Trust Certificate

This is to Certify, That on the first day of August, 1936, or upon the termination of the voting trust as in the Voting Trust Agreement provided, —— —— will be entitled to receive a certificate or certificates for —— (—) full-paid shares of the par value of One hundred Dollars ($100) each, of the common capital stock of the Rochester Telephone Corporation, a corporation organized under the Laws of the State of New York, and in the meantime to receive payments equal to the dividends, if any, collected by the undersigned Voting Trustees upon a like number of such shares of stock standing in their names, and until the said first day of August, 1936, the Voting Trustees shall possess and be entitled to exercise all rights of every name and nature, including the right to vote in respect of any and all such stock, it being expressly stipulated that no voting right [fol. 542] passes to the holder hereof by or under this certificate or by or under any agreement express or implied.

This certificate is issued pursuant to the terms and conditions of a certain agreement in writing dated as of the first day of August, 1926, by and between certain stockholders of said Company, parties of the first part, and said Voting Trustees, parties of the second part, and Lincoln-Alliance Bank, of Rochester, New York, party of the third

part, which agreement is on file with the said Lincoln-Alliance Bank; and the acceptance of this certificate shall bind each successive holder hereof to all the terms and conditions of said agreement with the same force and effect as if such holder were a party thereto.

This certificate is transferrable only on the books which shall be kept for that purpose by the Voting Trustees by the registered holder, either in person or by attorney duly authorized, according to rules which shall be established for that purpose by the Voting Trustees and on surrender hereof, and until so transferred said Voting Trustees may treat the registered holder as owner hereof for all purposes whatsoever, except that delivery of said certificates of stock hereunder shall not be made without the surrender hereof.

This certificate is not valid unless signed by the said Lincoln-Alliance Bank, the duly authorized agent of the Voting Trustees.

In Witness Whereof, the said Voting Trustees have [fol. 543] caused this certificate to be signed by their duly authorized agent.

George R. Fuller, W. Roy McCanne, Fred. C. Goodwin, Voting Trustees.

By their Agent hereunder:
Lincoln-Alliance Bank, by —— ——, Assistant Cashier."

Third. Any Stockholder of the Company who has not become a party hereto at the time when this agreement becomes effective, as hereinafter provided, may thereafter become one of the parties of the first part by depositing the shares of the stock of the Company owned by him with the Depositary hereunder, and either with or without signing this agreement. The acceptance by any such stockholder of a stock trust certificate from the Depositary in the form hereinabove provided, shall be conclusive evidence of the consent by such Stockholder to the terms of this agreement, with the same force and effect as if such Stockholder had personally affixed his signature hereto.

Fourth. At all times during the continuance of this agreement, the Voting Trustees shall possess and be entitled to exercise all rights, of every name and nature, including the right to vote in respect of any and all shares of stock of the company deposited hereunder, at any and all meetings of the

[fol. 544] Stockholders of the Company upon any and all propositions which may come up at any such meeting or meetings. It being understood, however, that the holders of the stock trust certificates to be issued by the Voting Trustees shall be entitled to receive payments equal to the dividends, if any, collected by the Voting Trustees upon the shares standing in their names and represented by such stock trust certificates respectively.

Fifth. In voting the stock deposited hereunder, the Voting Trustees shall exercise their best judgment from time to time to select a board of suitable directors which may include any or all of their own number, to the end that the affairs of the Company shall be properly managed. At least a majority of the directors so selected by the Voting Trustees shall be residents or business men within the territory served by the Rochester Telephone Corporation, and in no way affiliated or connected with the American Telephone and Telegraph Company, or the New York Telephone Company. In voting on others matters which may come before them at any stockholders' meeting, will exercise like judgment; but it is understood that no Voting Trustee incurs any responsibility by reason of any error of law, or mistake of judgment, or of any matter or thing done or omitted under this agreement, except for his own individual wrongdoing.

Sixth. For the purpose of avoiding any inconvenience or delay in the transfer of shares of stock (for which certificates have been issued in the name of the Voting Trustees) authorized or required by this agreement to be transferred by the Voting Trustees for the purpose of distributing the [fol. 545] stock of the Company upon the termination of this agreement, or for any other purpose arising by reason of the absence, resignation, death, or any other incapacity of any of the Voting Trustees, the Voting Trustees are authorized to execute and deposit with the Depositary assignments for all shares of stock of the Company standing in their names as Voting Trustees, together with powers of attorney for the transfer thereof; and the Depositary may, with the written consent of a majority of the Voting Trustees, make any and all transfers of stock deposited hereunder which the Voting Trustees are authorized or required to make by any provision of this agreement.

Seventh. The action of a majority of the whole number of Voting Trustees, except as otherwise expressly provided, shall constitute the action of the Voting Trustees, and shall have the same effect as if consented to by all. The Voting Trustees may adopt their own rules of procedure and it shall not be necessary for them to meet formally in order to take any action, but they may take such action by a resolution or instrument in writing signed by them, or a majority of them, as the case may be.

Eight. Any of the Voting Trustees may at any time resign by delivering to the Depositary his resignation, in writing, to take effect ten (10) days thereafter, and at the same time transmitting copies thereof to each of the other Voting Trustees by personally delivering the same, or by mail, in a duly postpaid envelope addressed to such Voting Trustees, care of the Depositary. And in every case of death, resignation, or vacancy arising through other cause, the vacancy so occurring shall be filled by the appointment [fol. 546] of a successor or successors to be made by the other Voting Trustees by a written instrument to be filed with the Dopositary. Any successor so appointed shall be a resident or business man of the territory served by the Rochester Telephone Corporation and in no way affiliated or connected with the American Telephone and Telegraph Company or the New York Telephone Company. And the term "Voting Trustees" as herein used shall apply to the parties of the second part and their successors hereunder.

Ninth. This agreement and the voting trust hereby created shall become effective on the first day of August, 1926, and shall terminate on the 31st day of July, 1936. Provided, however, that in case the preferred stock of the Company becomes entitled to vote for Directors, as in the Certificate of Incorporation provided, then and in that event the voting trust hereby created shall forthwith terminate.

Tenth. The Depositary shall incur no liability for anything done or permitted at the request or direction of the Voting Trustees in the exercise of their powers hereunder; the stock deposited hereunder being entitled to be held at the order or control of the Voting Trustees and the Depositary shall incur no liability whatsoever except for its own misconduct or neglect. The Depositary shall be entitled to be paid its reasonable expenses, counsel fees, and compensation for services rendered and incurred in and about the

execution of this agreement and the performance of its powers and duties hereunder. The depositary of the voting trust certificates, or any successor, may resign or be re-
[fol. 547] moved at any time by the voting trustees. In the event that any Depositary shall resign or be removed, or for any reason be unable to act, the Voting Trustees shall have full power and authority to appoint a new Depositary, and the Depositary resigning or removed shall forthwith deliver to such new Depositary all certificates of stock and all agreements and other papers which may be in its possession and custody hereunder. Any new Depositary so appointed shall be a duly incorporated bank or trust company organized under the laws of the State of New York and located in the City of Rochester, New York, and upon its appointment and acceptance of the same shall be vested with the same rights and duties, and be alike subject to removal under this agreement, as if it had been the Depositary in the first instance.

Eleventh. Any and all notices to be given to the holders of stock trust certificates may be given by personal delivery thereof or by mail, enclosed in a duly postpaid envelope, addressed to such holder at his last known post office address and upon the mailing of such notice the same shall be deemed to have been duly given, irrespective of the receipt thereof. Any and all notices to be given to the Voting Trustees may be given by delivering such notice to the Depositary, addressed to the Voting Trustees. All notices given personally, or by mail, as above set forth, shall be taken and considered as personal service on all parties hereto including the holders of stock trust certificates, and no further or other notice is required to be given under any provision of this agreement.

[fol. 548] Twelfth. The purpose and effect of this agreement is to extend, for a further period of ten (10) years, the voting trust created by an agreement dated as of the first day of August, 1921, hereinafter referred to as the old voting trust agreement. In order, therefore, to avoid the necessity of the transfer and retransfer of stock now subject to the old agreement, the subscribers hereto whose stock is now subject to that agreement hereby authorize and direct the Voting Trustees under said old voting trust agreement to assign and transfer such stock directly to the voting trustees under this present agreement.

In Witness Whereof, the several parties of the first part hereto have hereunto set their hands as of the day and year first above mentioned, and have written opposite their signatures their respective addresses and stockholdings, and the Voting Trustees have hereunto set their hands and seals, and the Depositary has caused its corporate name and seal to be subscribed, and affixed, in token of their several acceptances of the trusts hereby created.

George R. Fuller. (L. S.) Fred C. Goodwin. (L. S.)
W. Roy McCanne. (L. S.) Lincoln-Alliance Bank,
by T. R. Baker, Vice-President.

Stockholders	Addresses	No. of Shares
George R. Fuller	335 Main St. E.	375
Fred C. Goodwin	31 Exchange Street	280
W. Roy McCanne	1060 University Av.	10

[fol. 549] RESPONDENT'S EXHIBIT 13

Lincoln-Alliance, Bank and Trust Company,

Rochester, N. Y.

Certificate

Lincoln-Alliance Bank and Trust Company, of Rochester, New York, hereby certifies that it is the Transfer Agent and Depositary for the Voting Trustees representing Common Stock Holders of the Rochester Telephone Corporation, as provided in an Agreement dated the first day of August 1926 between said Stock Holders of the Rochester Telephone Corporation and George R. Fuller, W. Roy McCanne and Fred C. Goodwin, Voting Trustees, and Lincoln-Alliance Bank and Trust Company, of Rochester, New York, and, as such, has in its custody and possession the original Common Stock Trust Certificate Transfer Book showing the ownership and transfer of all Voting Trust Certificates; that the annexed stock record is a correct and complete transcript from the original Voting Trust Transfer Book and shows all transfers of the Voting Trust Certificates of said Voting Trustees and the ownership of all shares represented by said Voting Trust Certificates as of December 30, 1935, as the same appear on said Transfer Book.

In Witness Whereof said Lincoln-Alliance Bank and Trust Company has caused this Certificate to be signed by its Vice President thereunto duly authorized and has caused its corporate seal to be hereunto affixed this 31st day of December, 1935.

Lincoln-Alliance Bank and Trust Company, by Wm. H. Watson, Vice President. (Seal.)

[fol. 550] Rochester Telephone Corporation

Voting Trust Certificates Common Stock

	Certificates cancelled			Certificates issued		
1921						
Nov. 10	Voting Trust Certificates issued			George R. Fuller (1921–1926)	#1	375 Shs.
10	1921–1926			Fred C. Goodwin (1921–1926)	#2	280 "
10				W. Roy McCanne (1921–1926)	#3	10 "
1926						
July 31	George R. Fuller (1921–1926)	#1	375 Shs.	George R. Fuller (1926–1936)	#1	375 Shs.
	Fred C. Goodwin (1921–1926)	#2	280 "	Fred C. Goodwin (1926–1936)	#2	280 "
	W. Roy McCanne (1921–1926)	#3	10 "	W. Roy McCanne (1926–1936)	#3	10 "
1927						
July 2	George R. Fuller	#1	375 Shs.	W. Roy McCanne	#4	190 Shs.
				Fred C. Goodwin	#5	185 "
1934						
Nov. 23	W. Roy McCanne	#3	10 Shs.	Fred C. Goodwin	#6	200 Shs.
	"	#4	190 "			
1935						
Dec. 3	Fred C. Goodwin	#2	280 Shs.	Fred C. Goodwin	#7	333 Shs.
	"	#5	185 "	Marion J. Goodwin	#8	332 "
	"	#6	200 "			

[fol. 551] RESPONDENT'S EXHIBIT 14

Lincoln-Alliance Bank and Trust Company,

Rochester, N. Y.

Certificate

Lincoln-Alliance Bank and Trust Company, of Rochester, New York, hereby Certifies that it is the Transfer Agent for Rochester Telephone Corporation and, as such, has in its custody and possession the original Common Stock Transfer Book of such Corporation showing the ownership and transfer of all shares of the Common Stock of said Corporation; that the annexed Stock Record is a correct transcript from such original Common Stock Transfer Book and shows all transfers of shares of the Common Stock of said Rochester Telephone Corporation and the ownership of all such shares as of December 30, 1935, as the same appear on said Common Stock Transfer Book.

In Witness Whereof said Lincoln-Alliance Bank and Trust Company has caused this Certificate to be signed by its Vice President thereunto duly authorized and has caused its corporate seal to be hereunto affixed this 31st day of December, 1935.

Lincoln-Alliance Bank and Trust Company, by *R. F. Keinnan*, Vice President. (Seal.)

[fol. 552]

Rochester Telephone Corporation

Common Stock

Transcript of Stock Transfer Register

	Certificates cancelled			Certificates issued		
1921						
July 29	Original Issue			George F. Ruller, Trustee	#1	60 Shs.
29	"			Fred C. Goodwin	#2	10 "
29	"			W. Roy McCanne	#3	10 "
29	"			Tage P. Sylvan	#4	10 "
29	"			New York Telephone Co.	#5	325 "
29	"			George R. Fuller, Trustee	#6	585 "
Nov. 10	George R. Fuller, Trustee	#1	60 Shs.			
	"	#6	585 "	George R. Fuller, W. Roy McCanne & Fred C. Goodwin, Voting Trustees.	#7	665 Shs.
	Fred C. Goodwin	#2	10 "			
	W. Roy McCanne	#3	10 "		#8	Void
1922						
Feb. 24	Tage P. Sylvan	#4	10 Shs.	New York Telephone Co	#9	10 Shs.
1926						
July 31	George R. Fuller, W. Roy McCanne & Fred C. Goodwin, Voting Trustees.	#7	665 Shs.	George R. Fuller, W. Roy McCanne & Fred C. Goodwin, 1926–1936 Voting Trustees.	#10	665 Shs.

[fol. 553] RESPONDENT'S EXHIBIT 15

(Copy)

Certificate of Increase of the Amount of Capital Stock and of Classification and Reclassification of Shares of Rochester Telephone Corporation Pursuant to Section Thirty-six of the Stock Corporation Law

We, the undersigned, being the holders of record of all of the outstanding shares of the Rochester Telephone Corporation, a stock corporation organized and existing under the laws of the State of New York, entitled to vote on the purposes to be effected by this certificate, do hereby state and certify as follows:

1. The name of said corporation is "Rochester Telephone Corporation."

2. The certificate of incorporation of said corporation was filed in the office of the Secretary of State of the State of New York, at Albany, New York, on February 25, 1920.

3. The total amount of the previously authorized capital stock of said corporation is seven million dollars ($7,000,000).

4. The total number of shares which said corporation is already authorized to issue is seventy thousand (70,000), all of which have a par value of one hundred dollars ($100) each.

5. The shares already authorized are classified into, and the designations thereof are, Common Stock and Preferred Stock. The number of shares in each class already authorized is as follows: One thousand (1,000) shares of said stock are Common Stock and sixty-nine thousand (69,000) shares of said stock are Preferred Stock. The preferences, privileges and voting powers, or restrictions or qualifications of said classes of stock already authorized are as follows:

"The preferred stock shall be entitled to preference and priority over the common stock in the following manner, to wit:

"The preferred stock shall have the right to receive annual dividends at the rate of five per cent (5%) payable [fol. 554] semi-annually on the first days of July and Jan-

uary (or at such other dates as may be determined by the Board of Directors) in each and every year, out of the earnings of said corporation in preference to any dividends upon the common stock; such dividends shall, except as hereinafter restricted, be cumulative, so that any deficiency in the five per cent (5%) dividends to be paid on said preferred stock shall, except as hereinafter restricted, be made good out of the earnings of subsequent years before any dividends shall be paid upon the common stock, provided, that up to the close of the second fiscal year following the first issuance of preferred stock (whether of the whole or only part of the authorized amount of the preferred stock) such dividends shall not be cumulative, and that for the third fiscal year following such issuance the dividends shall be cumulative only as to three per cent (3%) and for the fourth fiscal year only as to four per cent (4%), and thereafter to the full amount of five per cent (5%), the fiscal year of the new corporation to be the calendar year, provided, that if the first issuance of preferred stock be made prior to April first the balance of the calendar year in which such issue is made shall be deemed to be the first fiscal year for the purposes aforesaid, but, if made after April first, the first fiscal year, for the purposes aforesaid, shall not — deemed to begin until the first day of January following such first issue of preferred stock.

"After the payment or declaration, for or in any calendar year, of the annual dividend upon the preferred stock, together with all accumulations, as hereinbefore provided, the common stock may receive and be paid a dividend of not exceeding five per cent (5%), and if there then remain additional surplus earnings or net profits, the preferred stock shall participate pro rata with the common stock in any further dividends for or in such calendar year which may be declared up to an additional dividend of three per cent (3%).

"The preferred stock shall be entitled to be repaid to the full extent of its par value upon any distribution of the assets of the corporation, in the event of insolvency or dissolution, before any distribution of capital shall be made to the common stock, and shall share pro rata with the common stock in any surplus assets remaining after the com-

[fol. 555] mon stock has been repaid to the full extent of its par value on any such distribution.

"The holders of the preferred stock shall have equal voting power with the common stock, except that they shall be without power to vote at any meetings of the stockholders of the corporation held for the purpose of electing directors or for the adoption or amendment of the By-Laws of the corporation, unless and until any time after the close of the second fiscal year (as hereinbefore defined) following the first issuance of preferred stock (whether of the whole or only part of the authorized amount of preferred stock) the corporation has failed (in which event it shall forthwith come into full voting power) to pay out of earnings dividends upon all of the issued and outstanding preferred stock at the rates provided to be cumulated as aforesaid, that is to say, three per cent (3% for the third fiscal year, four per cent (4%) for the fourth fiscal year following the first issuance, as aforesaid, of preferred stock, and five per cent (5%) per annum thereafter.

"No vote or consent of the stockholders upon any question of consolidation with any other corporation, or of the lease, sale or conveyance of any of the property, rights, privileges or franchises of the corporation, made otherwise than in the ordinary course and conduct of its business, or of the increase or reduction of the capital stock of the corporation, or of the issuance of preferred stock other than in this certificate provided, or of the guaranteeing of bonds of any other corporation, or of the alteration or amendment of this certificate (which matters are now provided for by section one hundred and four (104) of the Transportation Corporations Law, sections six (6), eight (8), eighteen (18), sixty-one (61) and sixty-two (62) to sixty-four (64) of the Stock Corporation Law) shall be or become effective for any purpose whatsoever unless concurred in by the affirmative vote or consent of at least eighty (80) per cent of the then issued and outstanding common stock of the corporation.

"Each stockholder entitled to vote at meetings held for the election of directors shall be entitled to as many votes [fol. 556] as shall equal the number of his voting shares of stock multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or

may distribute them among the number to be voted for, or any two or more of them as he may see fit."

6. The number of shares of each class of stock of said corporation now issued and outstanding is as follows: Common Stock, one thousand (1,000) shares; Preferred Stock, forty-eight thousand one hundred and forty (48,140) shares.

7. The amount to which the capital stock of said corporation is increased is twelve million dollars ($12,000,000.)

8. The total number of shares, including those previously authorized, which said corporation may henceforth have, shall be one hundred and twenty thousand (120,000), all of which, as heretofore, are to have a par value of one hundred dollars ($100) each. Of such shares one thousand (1,000) of the par value of one hundred thousand dollars ($100,000), being the Common Stock aforesaid now issued and outstanding, shall be and be designated Common Stock; fifty thousand (50,000), of the par value of five million dollars ($5,000,000), (being the amount by which the capital stock of said corporation is hereby increased) shall be classified as, and shall be and be designated First Cumulative Preferred Stock, and sixty-nine thousand (69,000), of the par value of six million nine hundred thousand dollars ($6,900,000), (including the forty-eight thousand one hundred and forty shares, of the par value of four million eight hundred and fourteen thousand dollars Preferred Stock now issued and outstanding) shall be reclassified as, and shall be and be designated Second Cumulative Preferred Stock.

The preferences, privileges and voting powers, or restrictions or qualifications, of each class shall be as follows:

(A) The First Cumulative Preferred Stock shall be issuable, in the discretion of the Board of Directors, in whole at the dividend bearing rate of six Per Cent, or Six and One-Half Per Cent, or in part at the dividend bearing rate of Six Per Cent, and in part at the dividend bearing rate of Six and One-Half Per Cent. The First Cumulative Pre- [fol. 557] ferred Stock shall have the right to receive annual dividends at the rate per cent appertaining to it, as aforesaid, and no more, payable semi-annually on the first days of July and January (or at such other dates as may be

determined by the Board of Directors) in each and every year, out of the earnings of the said corporation in preference to any dividends upon the Second Cumulative Preferred Stock and the Common Stock; such dividends shall be cumulative, so that any deficiency in the rate per cent, as aforesaid, annually to be paid on said First Cumulative Preferred Stock shall be made good out of the earnings of subsequent years before any dividends shall be paid upon the Second Cumulative Preferred Stock or the Common Stock. If at any time there shall be outstanding First Cumulative Preferred Stock bearing a dividend rate of Six Per Cent and First Cumulative Preferred Stock bearing a dividend rate of Six and One-Half Per Cent, there shall be no discrimination as between such stock in the declaration and payment of dividends, and if any dividend be declared on such stock at rates less than those appertaining thereto, the same proportion of the respective rates shall be observed in the declaration and payment of such dividend. The said cumulative dividends shall begin to accumulate with respect to each issue of said First Cumulative Preferred Stock upon the date of such issue, unless the Board of Directors of said corporation at or prior to the time of such issue shall provide that such issue be treated and be deemed to have been issued as of the fixed cumulative dividend rate preceding or succeeding the date of such issue; and such issue shall be entitled to fixed cumulative dividends from the date so fixed without prior accumulation; or the Board of Directors may provide that the dividend for the period between the date of issue and the next succeeding fixed cumulative dividend date, may be payable on the second dividend date thereafter.

(B) After the payment or declaration, for or in any calendar year, of the annual dividend upon the First Cumulative Preferred Stock, together with all accumulations, as hereinbefore provided, the Second Cumulative Preferred Stock shall have the right to receive annual dividends at the [fol. 558] rate of five per cent (5%), payable semi-annually on the first days of July and January (or at such other dates as may be determined by the Board of Directors) in each and every year, out of the earnings of the said corporation in preference to any dividends upon the Common Stock; such dividends shall, except as hereinafter restricted, be cumulative, so that any deficiency in the five per cent (5%)

dividends to be paid on said Second Cumulative Preferred Stock shall, except as hereinafter restricted, be made good out of the earnings of subsequent years before any dividends shall be paid upon the Common Stock, provided, that up to the close of the second fiscal year following the first issuance of the preferred stock originally authorized by the certificate of incorporation of said corporation (whether of the whole or only part of such originally authorized amount of the preferred stock) such dividends shall not be cumulative, and that for the third fiscal year following such issuance the dividends shall be cumulative only as to three per cent (3%), and for the fourth fiscal year only as to four per cent (4%), and thereafter to the full amount of five per cent (5%), the fiscal year of the said corporation to be the calendar year, provided, that for the purposes aforesaid, the first fiscal year shall comprise the period ending December 31, 1922.

(C) After the payment or declaration, for or in any calendar year, of the annual dividend upon the First Cumulative Preferred Stock and the Second Cumulative Preferred Stock, together with all accumulations, as hereinbefore provided, the Common Stock may receive and be paid a dividend of not exceeding five per cent (5%), and if, after payment of a dividend of five per cent (5%) on the Common Stock for or in any calendar year, there then remain additional surplus earnings or net profits, the Second Cumulative Preferred Stock shall participate pro rata with the Common Stock in any further dividends for or in such calendar year which may be declared up to an additional dividend of three per cent (3%).

(D) The First Cumulative Preferred Stock (without discrimination as between such stock of different dividend bearing rates) shall be entitled to be repaid to the full extent of its par value, plus an additional amount equal to the [fol. 559] amount of dividends accumulated and unpaid thereon, provided that, if there be not sufficient assets to pay such additional amount in full, the distribution on account of accumulated and unpaid dividends shall be so apportioned that each shall *shall* receive the same proportion of the aggregate amount of its accumulated and unpaid dividends, upon any distribution of the assets of the corporation, in the event of insolvency or dissolution, before any distribution of capital stock shall be made to the Second

Cumulative Preferred Stock or to the Common Stock. The holders of the First Cumulative Preferred Stock shall not be entitled to participate further in the distribution of the assets of the corporation.

(E) The Second Cumulative Preferred Stock shall be entitled to be repaid to the full extent of its par value, plus an additional amount equal to the amount of dividends accumulated and unpaid thereon, upon any distribution of the assets of the corporation, in the event of insolvency or dissolution, before any distribution of capital shall be made to the Common Stock, and shall share pro rata with the Common Stock in any surplus assets remaining after the Common Stock has been repaid to the full extent of its par value on any such distribution.

(F) The holders of the First Cumulative Preferred Stock shall have no right to vote or to act by consent at any meeting of the stockholders, nor shall they be entitled to any notice of any such meeting; they shall have no right to consent to, nor shall their consent be necessary for, any act or proceeding which may be authorized or affected by the affirmative action of any amount, whether a majority or otherwise, of the outstanding capital stock of the corporation, all such rights to vote or consent including the right to vote in a proceeding for mortgaging the property and franchises of the corporation, for guaranteeing the bonds of another corporation, for the sale of the franchises and property, for establishing priorities or creating preferences among the several classes of stock, for consolidation, for voluntary dissolution, or for the change of name of the corporation, being hereby specifically excluded pursuant to [fol. 560] the provisions of Section 51 of the Stock Corporation Law, and being expressly waived by the holders of such First Cumulative Preferred Stock. The holders of the First Cumulative Preferred Stock shall have no right, by virtue of such ownership, to subscribe to any stock, either preferred or common, issued by the corporation.

(G) The holders of the Second Cumulative Preferred Stock shall have equal voting power with the Common Stock, except that they shall be without power to vote at any meetings of the stockholders of the corporation held for the purpose of electing directors or for the adoption or amendment of the By-Laws of the corporation, unless and until

any time after the close of the second fiscal year (as hereinbefore defined) the corporation has failed (in which event it shall forthwith come into full voting power) to pay out of earnings dividends upon all of the issued and outstanding Second Cumulative Preferred Stock at the rates provided to be cumulated as aforesaid, that is to say, three per cent (3%) for the third fiscal year, four per cent (4%) for the fourth fiscal year, as aforesaid, and five per cent (5%) per annum thereafter.

(H) Unless and until the Second Cumulative Preferred Stock shall come into full voting power, as aforesaid, no vote or consent of the stockholders upon any question of consolidation with any other corporation, or of the lease, sale or conveyance of any of the property rights, privileges or franchises of the corporation, made otherwise than in the ordinary course and conduct of its business, or of the increase or reduction of the capital stock of the corporation, or of the issuance of preferred stock other than in this certificate provided, or of the guaranteeing of bonds of any other corporation, or of the alteration or amendment of its certificate of incorporation (which matters were, on the date of the filing of the certificate of incorporation of said corporation provided for by section one hundred and four (104) of the Transportation Corporations Law, section six (6), eight (8), eighteen (18), sixty one (61), and sixty-two (62) to sixty-four (64) of the Stock Corporation Law) shall be or become effective for any purpose whatsoever unless [fol. 461] concurred in by the affirmative vote or consent of at least eighty per cent (80%) of the then issued and outstanding Common Stock of the corporation.

(I) All or any part of the First Cumulative Preferred Stock shall be subject to redemption by the corporation at the option of its Board of Directors, on sixty days' notice given by mail to each stockholder of record of said First Cumulative Preferred Stock affected and by publication, on any dividend payment date, at par and the amount of all dividends accumulated and unpaid thereon at the redemption date, plus a premium of ten per cent upon the par value of such stock. Redemption of less than all the shares of said First Cumulative Preferred Stock bearing a like dividend rate shall be made pro rata with respect to the holders thereof, except that fractions of shares shall be disregarded and the redemption shall include full shares

only. On such date fixed for redemption, upon performance by the corporation of all things necessary on its part to complete the redemption, all rights of the holders of such First Cumulative Preferred Stock with respect thereto shall cease; and on and after the date fixed for redemption, shares called for redemption shall not be transferable by the holders thereof upon the books of the corporation, except to the corporation.

(J) The corporation may, subject to the provisions of subdivision "(H)" hereof, from time to time increase the authorized amount either of said First Cumulative Preferred Stock or of said Second Cumulative Preferred Stock or of both and may also from time to time create other classes of preferred stock with different privileges and restrictions; but as long as any of said First Cumulative Preferred Stock authorized by this certificate is outstanding, no preferred stock of a different class having preferences which are in any respect superior to those of the First Cumulative Preferred Stock shall be authorized or issued.

(K) Each stockholder entitled to vote at meetings held for the election of directors shall be entitled to as many votes as shall equal the number of his voting shares of [fol. 562] stock multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit.

In Witness Whereof, we have subscribed and acknowledged, in person, this certificate in duplicate, this 26th day of March, 1926.

New York Telephone Company, by T. P. Sylvan, Vice President.

Attest: G. S. Weedon, Assistant Secretary. (Seal.)

George R. Fuller, W. Roy McCanne, and Fred C. Goodwin, as Trustees, by George R. Fuller. W. Roy McCanne.

[fol. 563] State of New York,
County of Monroe,
City of Rochester, ss:

On the 26th day of March, 1926, before me, the subscriber, personally appeared George R. Fuller and W. Roy

McCanne, Trustees under a Voting Trust Agreement dated August 1, 1921, by and between the subscribing stockholders of Rochester Telephone Corporation, to me known and known to me to be the same persons described in and who executed the foregoing instrument and they severally duly acknowledged to me that they executed the same as such Trustees aforesaid.

Katherine L. Gabel, Notary Public, Monroe County, New York. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of March, 1926, before me personally came T. P. Sylvan, to me known, who, being by me duly sworn, did depose and say that he resides in the City of Montclair, New Jersey; that he is a Vice President of the New York Telephone Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Charles A. Hale, Notary Public. New York County #21. Certificate filed in Albany County. (Seal.)

[fol. 564] STATE OF NEW YORK,
County of Monroe, ss:

Thomas J. Hargrave, being duly sworn, deposes and says; that he is Secretary of the Rochester Telephone Corporation, the corporation mentioned in the foregoing certificate; that the corporation and persons who have executed said certificate, in person, constitute the holders of record of all the outstanding Preferred Stock and of all the outstanding Common Stock of said corporation, being all of the outstanding shares of said corporation entitled to vote on the increase of the capital stock of said corporation and on the classification and reclassification thereof to be effected by said certificate.

Thomas J. Hargrave.

Subscribed and sworn to before me this 26th day of March, 1926. Katherine L. Gabel, Notary Public, Monroe Co. (Seal.)

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C., January 7, 1936.

Pursuant to Section 412 of the Communications Act of 1934, I hereby certify that the annexed documents are true copies of the questionnaire executed by the Rochester Telephone Corporation, Rochester, N. Y., under date of January 3, 1935, and letter of John P. Boylan, President of the Rochester Telephone Corporation, dated January 3, 1935, transmitting this questionnaire to the Federal Communications Commission, on file in this Commission, and that I am the proper custodian of the same.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Communications Commission to be affixed, on this seventh day of January, 1936.

Secretary.

Docket No 3293
Resp Exhibit 16
Hearing before Federal Communications Commission 1/8/36
Ward & Paul, Official Reporters

C O P Y

ROCHESTER TELEPHONE CORPORATION
500 Triangle Building
Rochester, N. Y.

January 3, 1935

Office of the President

Herbert L. Pettey, Secretary,
Federal Communications Commission,
Washington, D. C.

Dear Sir:

In accordance with the request in your letter of December 15, 1934, I am returning the questionnaire "Amended 11450" with the necessary information.

In supplying the answers to the questions I have not always adhered to the letter of the questions, but I have included such collateral information as would seem to be helpful to the Commission in determining the status of this Corporation.

It is our contention that as our property is situated wholly within a single state (the State of New York) to the regulation of whose Public Service Commission we are subject, and that as the interstate business which we transact constitutes only a minor part of our whole business, we are not subject to the jurisdiction of the Federal Communications Commission.

I trust that the information contained in the accompanying questionnaire is sufficient for your purpose. If there has been any omission, or if there be any further information which may be helpful to you, and which I can supply, I shall be glad to do so.

Very truly yours,

/s/ John P. Boylan

John P. Boylan
President

Y

AMENDED 11-30

NOTE: If space is insufficient for full and complete answer to all questions, additional sheet of paper may be attached. It is important that all questions are answered in full.

Name of Company: Rochester Telephone Corporation

Address of Company: 335 Main St. East, Rochester, N. Y.

Officer Making Return: John P. Boylan, President

Address of such Officer: 335 Main St. East, Rochester, N. Y.

Statement of Control:

1. Is telephone company controlled by any individual, corporation, association of individuals, or corporations, or other agency? (By control is meant the ability to control or influence the action of your company and includes joint control which rests in two or more persons, corporations, or other associations.) Yes

2. If so, by whom is it controlled or influenced? Fred C. Goodwin, J. Foster Warner, John P. Boylan

3. Manner of control or influence? (If by stock ownership, supervision contract, or other method. File copy of any contract or agreement by which control is established, or explain fully the nature of the control.) By voting trust giving to the above named individuals the power to vote 665 shares (approximately two-thirds) of the common stock.

4. Extent of control or influence. (If by stock ownership, give total number of shares of voting stock and number of shares held by controlling or influencing interest.) There are outstanding 1 000 shares of common stock, which ordinarily has the sole voting power. The vote of 665 shares of this stock is in the hands of the voting trust referred to in the answers to qq. 2 and 3 above. See also the attached statement in explanation of the New York Telephone Company's ownership of stock.

5. If answer to No. 1 above does not indicate where control ultimately rests, trace line of control back as far as the information which your company possesses or can obtain permits, giving the names and addresses and manner and extent of control of all intermediates up to and including the final control on which report can be made.

No answer required.

6. Does your company own or control any stock in any other telephone company? No.

7. If so, set out in detail, giving name of company, amount of stock, kind of control, etc. No answer required.

8. Is your company directly or indirectly controlling, or controlled by, or under direct or indirect common control with, any other carrier?

No.

9. If so, explain fully. No answer required.

10. Amount of capital stock. See attached statement for answers to these questions.

(a) Amount of stock outstanding.

(b) Name and address of shareholders of record holding more than one per cent of outstanding capital stock and amount held.

11. Mortgages and loans: See attached statement for answers to these questions.

(a) Amount of outstanding mortgages or loans.

(b) Name of persons, corporations, or firms to whom such indebtedness is owed.

Statement as to Exchange and Lines:

1. Do any of your lines cross state or national boundaries? No

2. If so, No answer required.

(a) Do you conduct a toll business over such lines?

(b) Do you conduct an exchange business over such lines?

(c) Are your charges, classification practices, service facilities, or regulations for or in connection with wire telephone exchange service, subject to regulation by a state commission or by local governmental authority?

3. Does your company have physical connection with any telephone company which does an interstate business (that is, are your lines connected with the lines of others through switchboards or otherwise which enables a person in one state to talk with a person in another state)?

Yes

(a) If so, give name and address of company. New York Telephone Company, 140 West St., New York, N. Y.

4. Does your company receive any revenue or commissions from interstate tolls? Yes

(a) If so, explain fully, giving percentage or amount.

See attached statement for answer to this question.

5. Does your company maintain its own switchboard? See attached statement for answers to this question.

If not,

(a) Who does your switching?

(b) On what terms?

6. Do you own the (1) poles, (2) wires, and (3) phones on your telephone line? Yes, as to all three items

(a) If not, explain in detail who does.

No answer required.

ature and amount of business:

1. State the nature of your organization, whether a corporation, association, partnership, mutual concern, or person. A corporation.

2. If a mutual organization, state total number of members. No answer required.

(a) Amount of annual assessments for each member? $

(b) Total annual assessments? $

3. If a mutual organization, do you allow non-member subscribers to your telephone line? No answer required.

(a) If so, on what terms?

4. If a mutual organization, state: No answer required.

(a) Number of member subscribers.

(b) Number of non-member subscribers.

5. Do you conduct a commercial telephone business for the general public? Yes

(a) If not, describe the kind of business conducted.

6. Total number of subscribers. (This question must be answered by every telephone company.) 65 865, at end of November, 1934.

7. Give total amount of income of your company for year ending December 31, 1933. $4 442 092.65 including taxes

8. Give total amount of operating expenses/for same period. $ 3 725 123.45

/s/ John P. Boylan
John P. Boylan, President
Officer Making Return.

Subscribed and sworn to before me this 3d day of January 1935.

NOTARIAL SEAL

Katherine L. Gabel
Notary Public.

My Commission expires: March 1936.

ROCHESTER TELEPHONE CORPORATION

Supplement to Questionnaire "Amended 11450"
of Federal Communications Commission.

Answers to Q. 10, under "Statement of Control".

10. Authorized $12 000 000; Issued, $7 196 600.

10-a.

	Authorized	Outstanding
First Preferred	$ 5 000 000	$2 282 600
Second Preferred	6 900 000	4 814 000
Common	100 000	100 000
	$12 000 000	$7 196 600

10-b. List of Stockholders owning more than one per cent. of the outstanding capital stock of the class described.

Name	Address	Number of Shares
First Preferred Stock		
Charles F. Ames	c/o Eastman Kodak Co., Rochester, N. Y.	375
The Equitable Life Assurance Society of the U.S.	393 Seventh Ave., New York, N. Y.	621
Friendship Telephone Co.	140 West St., New York, N. Y.	336
Griffin & Co.	c/o City Bank Farmers Trust Co., 22 William St., New York City.	250
Henry W. Griffith	41 Cuyler St., Palmyra, N. Y.	280
Rochester Trust & Safe Deposit Co.	Rochester, N. Y.	1 000
Security Trust Co.	Rochester, N. Y.	1 000
Tegge & Co.	c/o Guaranty Trust Co. New York, N. Y.	380
Second Preferred Stock		
New York Telephone Co.	140 West St., New York, N. Y.	48 140
Common Stock		
Fred C. Goodwin J. Foster Warner John P. Boylan	31 Exchange St.) 130 Main St. E.) 335 Main St. E.)	Rochester, N.Y. 665
New York Telephone Co.	140 West St., New York, N. Y.	335

The First Preferred Stock is without voting power.

The Second Preferred Stock held by the New York Telephone Company has no voting power with respect to the election of directors or for the adoption or amendment of By-Laws except in the event that its dividends, at the rate of 5 per cent. per annum, are unpaid.

Upon the questions of

(1) consolidation with another corporation,

(2) the lease, sale or conveyance of property, rights and franchises otherwise than in the ordinary course of business, or

(3) the increase or reduction of its capital stock, or

(4) the issuance of Preferred Stock, or

(5) the guaranteeing of bonds of another corporation, or

(6) the alteration or amendment of its Certificate of Incorporation,

the Preferred Stock has voting power, but none of the propositions mentioned may be carried or made effective without the affirmative vote or consent of at least 80 per cent. of the Common Stock.

The Common Stock(except under the conditions stated above with respect to the Second Preferred Stock) has the sole voting power in the election of directors and the amendment of the By-Laws.

In order to understand the New York Telephone Company's ownership of stock in this Corporation it will be helpful to review briefly the reasons which led to the organization of this Corporation.

Rochester Telephone Corporation was incorporated February 14, 1920, and was formed for the purpose of taking over and unifying the properties of the Rochester Telephone Company (an independent competing company) and that part of the property of the New York Telephone Company (Bell company) which was in the same territory, thus providing a single telephone service for Rochester and the tributary suburban area. The new corporation acquired these properties and began its operations on August 1, 1921, consent of the Public Service Commission of the State of New York having been formally given in its order of June 1, 1921.

The preliminary arrangements for the unification of the telephone service in the Rochester area provided that the Rochester Telephone Company would receive the bonds of the new Corporation in payment for its property, and that the New York Telephone Company would receive preferred stock. In each case the payment made was based on the appraised value of the property at the time of the transfer. In accordance with these arrangements the New York Company received $4 814 000 of preferred stock. In order to safeguard its interest (approximating $5 000 000) in the new Corporation the New York Company also acquired 335 shares of the common stock of the new Corporation, thus enabling it to name five of the Corporation's fifteen directors.

Answers to Q. 11, under "Statement of Control".

11(a) Funded Debt	$ 6 291 000.00
Notes:	
To Lincoln-Alliance Bank & Trust Co., as Trustee of Employes' Pension Fund	524 113.89
To Lincoln-Alliance Bank & Trust Co.	200 000.00
	$ 7 015 113.89

These data are as of October 31, 1934

(b) As to the funded debt, this Corporation does not know who owns its bonds, which are coupon bonds. The name of the creditor in the case of the notes is given under "a" above.

Answer to ". 4 (a) under "Statement as to Exchange and Lines".

No records are maintained which show separately the amounts of revenue or commissions derived from interstate business. This Corporation has an agreement with the New York Telephone Company for the interchange of toll business, both intrastate and interstate, where one of the termini of the business is outside the area in which this Corporation operates. The commission allowed this Corporation for business delivered to the New York Telephone Company, is calculated according to a sliding scale, and approximates 21 per cent. of the amount of the originating business. Were the commissions on interstate business calculated separately they would probably be somewhat more than 21 per cent., because the hauls (and consequently the charges) on interstate business are greater than on intrastate business.

Interstate business is only a very small part of this Corporation's total business, representing less than 0.20 per cent. of its total volume of traffic, and accounting for less than 4.00 per cent. of its total operating revenues.

Answers to Q. 5 under "Statement as to Exchange and Lines".

5. This Corporation owns and maintains its own switchboards at all points at which it operates, except that at Rochester the toll board is owned and operated by the New York Telephone Company. All local (exchange) traffic is handled by this Corporation. This Corporation likewise handles all toll traffic originating and terminating within its own territory, with the exception of certain toll traffic originating at Rochester, which is handled by the New York Telephone Company.

5(a) and 5(b). As to business originating or terminating outside this Corporation's territory, the answers to these questions are given in the answer to Q. 4(a) above. As to toll business at Rochester which is intra-territorial, that business (except certain so-called "A-B tolls" which are handled by this Corporation's "A" operators at the several central offices) is handled by the New York Telephone Company. The need of two toll boards at Rochester, one for intra-territorial business, and another for extra-territorial business, is thus avoided.

For its services in handling this Corporation's intra-territorial business at Rochester, this Corporation pays the New York Telephone Company the fixed sum of $320.93 per month, plus 2.50 cents per message for messages ticketed at "A" boards, and 24.08 cents per message for messages ticketed at the Rochester toll board.

The charges above stated were determined as the result of a study made in 1932, and they are subject to review and revision from time to time as changing conditions may require.

January 3, 1935.

UBBELL, TAYLOR, GOODWIN, NIXON & HARGRAVE
31 EXCHANGE STREET,
ROCHESTER, N.Y.

February 7, 1936.

RE: Petition of Rochester Telephone Corporation for Exemption from Communications Act of 1934 - Docket No. 3293.

Ward and Paul,
Official Reporters,
Earle Building,
Washington, D. C.

Dear Sirs:

There are enclosed herewith two copies of certain proposed exhibits which I was requested by the Examiner to furnish at the Hearing of January 16, 1936 in this matter. I have referred to the page of the Minutes of the Hearing of January 16, 1936 where the proposed exhibit was requested. I have sent two copies of each of these enclosures to Judge Roberson and have notified the Examiner that the documents have been furnished, as requested:

1. Two copies (in the form of photostats of a number of separate contracts, all fastened together) of all agreements between the Rochester Telephone Corporation and Radio Station W-H-A-M at Rochester, for the leasing of circuits to such Radio Station. (S.M.305)

2. Two copies (in the form of photostats of a number of separate contracts, all fastened together) of all agreements between the Rochester Telephone Corporation and Radio Station W-H-A-C at Rochester, for the leasing of circuits to such Radio Station. (S.M.305)

3. Two certified copies of the Minutes of the Meeting of the Board of Directors of the Rochester Telephone Corporation held March 26, 1926, at which the execution of a Certificate increasing and classifying the capital stock of the Rochester Telephone Corporation was authorized. (S.M.313)

4. Two certified copies of the Minutes of the first meeting of the Incorporators, stockholders and Directors of the Rochester Telephone Corporation, together with a waiver of notice of that meeting, which meeting was held on May 7, 1920. (S.M.313)

TAYLOR, GOODWIN, NIXON & HARGRAVE
31 EXCHANGE STREET
ROCHESTER, N.Y.

577-624

5. A map showing the intra-territorial toll system of the Rochester Telephone Corporation (6.M.230)

6. Two copies of the Lease between the Rochester Telephone Corporation and the New York Telephone Company, dated July 26, 1926, of certain floor space at the main office (98 North Fitzhugh Street) Rochester, N. Y.

Very truly yours,

N:F

Encls.

COPY

[fol. 625] I, F. C. Goodwin, Jr., Secretary of Rochester Telephone Corporation, hereby Certify that the attached is a true and exact copy of Minutes of the meeting of the Board of Directors of said corporation, duly called and held in the City of Rochester, New York, on the 26th day of March, 1926.

In Witness Whereof, I have hereunto set my hand and the seal of said corporation, this 30th day of January, 1936.

F. C. Goodwin, Jr., Secretary. (Seal.)

[fol. 626] Minutes of a regular meeting of the Board of Directors of Rochester Telephone Corporation, held at the principal office of the Corporation, No. 335 Main Street, East, in the City of Rochester, N. Y., on the 26th day of March, 1926, at twelve-thirty o'clock in the afternoon.

George R. Fuller, President of the Corporation, called the meeting to order.

The following Directors were present: Messrs. Fuller, Lomb, Nixon, Jacobs, Warner, McCanne, Humphrey, Woodbury, Lannin, Stevens and Powers.

The following Directors were absent: Messrs. Foraker, Sylvan, Goodwin and Wheeler.

The Secretary read the minutes of the regular meeting of the Board of Directors and the minutes of the first meeting of the newly elected Board of Directors held on February 26, 1926, and the same were, upon motion duly made and seconded, unanimously approved as read.

Upon motion of Mr. Woodbury, duly seconded by Mr. Lomb, it was unanimously

Resolved: That the action of the officers in taking steps to have the authorized capital stock of the Rochester Telephone Corporation increased by the unanimous consent of the stockholders from seven million dollars ($7,000,000), consisting of one thousand (1,000) shares, of the par value of $100 each, of Common Stock, and sixty-nine thousand (69,000) shares, of the par value of $100 each, of Preferred Stock, to twelve million dollars ($12,000,000), the increased amount of such capital stock, to wit, five million dollars ($5,000,000), to consist of fifty thousand (50,000) shares, of the par value of $100 each, of non-voting First Cumu-

lative Preferred Stock, issuable, in the discretion of the Board of Directors, in whole at the dividend bearing rate of 6% or 6½%, or in part at the dividend bearing rate of 6% and in part at the dividend bearing rate of 6½%, having preference and priority over the present Preferred Stock [fol. 627] and the Common Stock, as to dividends, and to be entitled to be repaid to the full extent of its par value, plus any dividends accumulated and unpaid thereon, upon any distribution of the assets of said corporation, in the event of insolvency or dissolution of said corporation, before any distribution of capital shall be made to the present Preferred Stock or to the Common Stock; such new Preferred Stock, however, not to be entitled to participate further in any distribution of the assets of said corporation, be and the same hereby is authorized, ratified and approved: Further

Resolved: That if and when the authorized capital stock of the company shall have been increased and classified as aforesaid, the officers be and they hereby are authorized to issue not to exceed two million dollars ($2,000,000) par value of such First Cumulative Preferred Stock at the dividend bearing rate of 6½%, as they may deem advisable for the acquisition of property and the construction, completion, extension and improvement of facilities or the improvement or maintenance of its service within the State of New York, for the discharge or lawful refunding of its obligations, and for the reimbursement of moneys actually expended from income from any source within five years last past, and to apply for and obtain such approvals and authorizations, execute such papers and perform such acts as counsel may advise to be necessary or proper for the lawful issue of such First Cumulative Preferred Stock; and they are further authorized and directed to offer said amount of 6½% First Cumulative Preferred Stock for subscription at not less than par, to such persons and upon such terms and conditions as they may determine, subscriptions therefor to be accepted for full shares only.

Mr. Boylan submitted the following estimates for the approval of the Board:

Est. 461—Additional 909-Pair Arrestors, Culver Office, Rochester—$1,271.

Est. 462—Installation of Two Private Branch Exchange Switchboards, One Order Table and One Additional P. B. X. Section, Rochester—$9,754.81.

Total amount of Estimates presented—$11,025.81.

Upon motion duly made and seconded, it was unanimously

Resolved: That the foregoing estimates be, and the same are hereby, approved and that the money necessary to carry the same into effect be, and the same is hereby, appropriated for that purpose.

[fol. 628] Mr. Boylan submitted the financial report for the month of February, 1926, and after careful consideration it was, upon motion duly made and seconded, unanimously

Resolved: That the said financial report for the month of February, 1926, be, and the same is hereby, approved and ordered filed, and that the acts and records of the officers and agents of the Corporation, as shown by such report, be, and the same are hereby, ratified, approved and confirmed.

Upon motion of Mr. Woodbury, duly seconded by Mr. Lannin, it was unanimously

Resolved: That this Corporation sell to William C. Mielke, of Bergen, N. Y., 106 poles and 212 crossarms, now part of a duplicate line on the Lake Road in the Town of Bergen, for a price of $200, and that the President or a Vice President of this Corporation be, and he is hereby, authorized and directed to execute and deliver a bill of sale transferring and conveying title to said poles against payment of the purchase price.

Upon motion of Mr. Woodbury, duly seconded by Mr. Lannin, it was unanimously

Resolved: That this Corporation sell to the Bergen Municipal Commission, Bergen, N. Y., 31 poles, now part of a duplicate line on the Lake Road in the Town of Bergen, for a price of $155, and that the President or a Vice President of this Corporation be, and he is hereby, authorized

and directed to execute and deliver a bill of sale transferring and conveying title to said poles against payment of the purchase price.

There being no further business, the meeting duly adjourned.

Thomas J. Hargrave, Secretary.

[fol. 629] I, F. C. Goodwin, Jr., Secretary of Rochester Telephone Corporation, hereby Certify that the attached is a true copy of Minutes of the first meeting of incorporators, stockholders and directors of the Rochester Telephone Corporation held at No. 919 Insurance Building, No. 19 Main Street, West, Rochester, Monroe County, New York, on the 7th day of May, 1920, at 3 o'clock in the afternoon.

In Witness Whereof, I have hereunto set my hand and the seal of said corporation, this 28th day of January, 1936.

F. C. Goodwin, Jr., Secretary. (Seal.)

[fol. 630] Minutes of first meeting of incorporators, stockholders, and directors of the Rochester Telephone Corporation held at No. 919 Insurance Building, No. 19 Main Street, West, Rochester, Monroe County, New York, on the 7th day of May, 1920, at three o'clock in the afternoon.

The meeting was called to order by Mr. George R. Fuller, who was duly chosen to act as chairman of the meeting. Mr. Thomas J. Hargrave was duly chosen secretary of the meeting.

The following were present in person:

Incorporators and Stockholders:

George R. Fuller.
Fred. C. Goodwin.
Frederick W. Zoller.
J. Foster Warner.
T. Carl Nixon.
Charles A. Spaulding.

Directors:

George R. Fuller.
Fred. C. Goodwin.
Frederick W. Zoller.
J. Foster Warner.
Carl F. Lomb.
Thomas E. Lannin.

Frank T. Sage.
T. Carl Nixon.
Charles A. Spaulding.
Peter O. Jacobs.
William B. Woodbury.
John Craig Powers.

The following were absent:

Incorporators and Stockholders:

W. Roy McCanne.
Tage P. Sylvan.
Hiram F. Stevens.

Directors:

W. Roy McCanne.
Tage P. Sylvan.
Hiram F. Stevens.

[fol. 631] The secretary of the meeting presented a written waiver of notice of the meeting, duly signed by all the incorporators, stockholders, and directors, fixing the time and place of this meeting, and it was duly ordered that such waiver be affixed to the record of the minutes of this meeting.

The chairman then presented a copy of the certificate of incorporation and stated that on February 25, 1920, the original certificate of incorporation, duly executed and acknowledged, had been duly filed and recorded in the office of the Secretary of State, at Albany, N. Y.; that on February 26, 1920, a duplicate original thereof had been duly filed and recorded in the office of the Clerk of Monroe County; that the organization tax had been duly paid to the State Treasurer of New York, and that the statutory filing and recording fees had been paid to the Secretary of State and the Clerk of Monroe County, respectively. It was thereupon ordered that said copy of the certificate of incorporation be filed and that a copy thereof be prefixed to the record of the minutes of this meeting.

The chairman then submitted, for the consideration of the meeting, the proposed by-laws of the corporation and stated that the same had been prepared by the attorneys for the corporation and in accordance with the instructions of the incorporators. After full discussion and consideration, and upon motion of Mr. Warner, seconded by Mr. Spaulding, the

following resolutions were unanimously adopted by all the incorporators and stockholders present:

Resolved: That the By-laws now submitted to this meeting be and they hereby are adopted as the by-laws of the corporation; Further

Resolved: That said by-laws be prefixed to the record of the minutes of this meeting.

[fol. 632] The secretary then submitted forms of common and preferred stock certificates for approval of the directors present, and after due consideration it was, upon motion of Mr. Goodwin, duly seconded by Mr. Woodbury:

Resolved: That the secretary prefix a copy of the form of common and of the preferred stock certificate to the record of the minutes of this meeting, and that he procure for the corporation certificates of common and preferred stock, in accordance with said approved forms.

Upon motion duly made by Mr. Woodbury, seconded by Mr. Zoller, the directors present unanimously adopted the following resolutions:

Resolved: That the funds of this corporation, until further ordered, be deposited in its name with the Lincoln National Bank of Rochester and the Alliance Bank, of Rochester, N. Y.: Further

Resolved: That all funds of this corporation, now or hereafter deposited with the Lincoln National Bank of Rochester, of Rochester, N. Y., shall be subject to the check of the corporation, signed by its treasurer, or secretary, and countersigned by its president, or a vice-president, and that said Bank be, and hereby is, authorized and directed to honor and pay any such checks so signed, including any checks payable to any or either of such officers, individually, and to charge the amount thereof to the account of this corporation: Further

Resolved: That all funds of this corporation now or hereafter deposited in the Alliance Bank, shall be subject to be withdrawn upon the check, draft, note, or order, of the corporation, signed by its treasurer, or secretary, and countersigned by its president, or a vice-president, and that said Bank is hereby authorized to pay such checks, drafts, notes, or orders, and also to receive the same for the credit of or in payment from the payee, or any other holder, when so

signed, without inquiry as to their issue or the disposition of their proceeds, whether drawn to the individual order of, or [fol. 633] tendered in payment of individual obligations of, the officers above named, or other officers of this corporation, or otherwise.

It was thereupon ordered that copies of the above resolutions, certified by the secretary, be transmitted to said Banks.

Upon motion duly made by Mr. Warner, seconded by Mr. Sage, it was, by the unanimous vote of all the directors present:

Resolved: That the principal office of the corporation be located at No. 335 Main Street, East, in the City of Rochester, Monroe County, New York.

Upon motion duly made by Mr. Sage, seconded by Mr. Nixon, the following officers of the corporation were unanimously elected by the directors present for the ensuing year:

President, George R. Fuller.
Vice-president, Fred. C. Goodwin.
Treasurer, Charles M. Beattie.
Secretary, Thomas J. Hargrave.

Upon motion duly made by Mr. Powers, seconded by Mr. Nixon, the following directors of the corporation were unanimously elected to the Executive Committee for the ensuing year:

William B. Woodbury.
Tage P. Sylvan.
George R. Fuller.
Fred. C. Goodwin.
W. Roy McCanne.

Upon motion duly made by Mr. Woodbury, seconded by Mr. Warner, it was, by the directors present, unanimously

Resolved: That each member of the Board of Directors and of the Executive Committee be paid a fee of Ten Dollars ($10), plus traveling expenses, for each regular and special meeting which he shall attend: Further

Resolved: That the Inspectors of Election be paid a fee of Five Dollars ($5) each.

[fol. 634] The chairman then presented a written agreement dated February 25, 1918, between George R. Fuller, W. Roy McCanne, Frederick W. Zoller, the Rochester Telephone Company and the New York Telephone Company, pursuant to the terms of which this corporation was incorporated, and it was, on motion duly made by Mr. Goodwin, seconded by Mr. Warner, unanimously

Resolved: That the officers of this corporation be, and they are hereby, authorized, directed and empowered to execute, acknowledge and deliver, on behalf of this corporation and in its name and under its corporate seal, or otherwise, any and all instruments and documents in writing, and to do and perform all such further acts, under or in connection with the agreement, a copy of which is appended to this resolution, dated February 25, 1918, between George R. Fuller, W. Roy McCanne, Frederick W. Zoller, the Rochester Telephone Company and the New York Telephone Company, and under or in connection with the proposed supplemental agreement about to be entered into between the same parties (changing the amount of the proposed mortgage of this corporation contemplated by said original agreement from Five Million dollars ($5,000,000) to Ten million dollars ($10,000,000), extending the time of performance of said original agreement from twenty-four (24) to thirty-two (32) months from the date of Federal-New York Consolidation, adding the properties of the Nunda and Tuscarora Telephone Companies to the properties to be conveyed by the Rochester Telephone Company to this corporation, and altering said original agreement in certain minor details) as counsel may deem necessary, convenient or proper to carry into effect said agreements and to effect the consolidation of the plants and properties and issuance of the stocks, bonds and notes as in and by said agreements provided and contemplated.

There being no further business, upon motion duly made and seconded, the meeting adjourned.

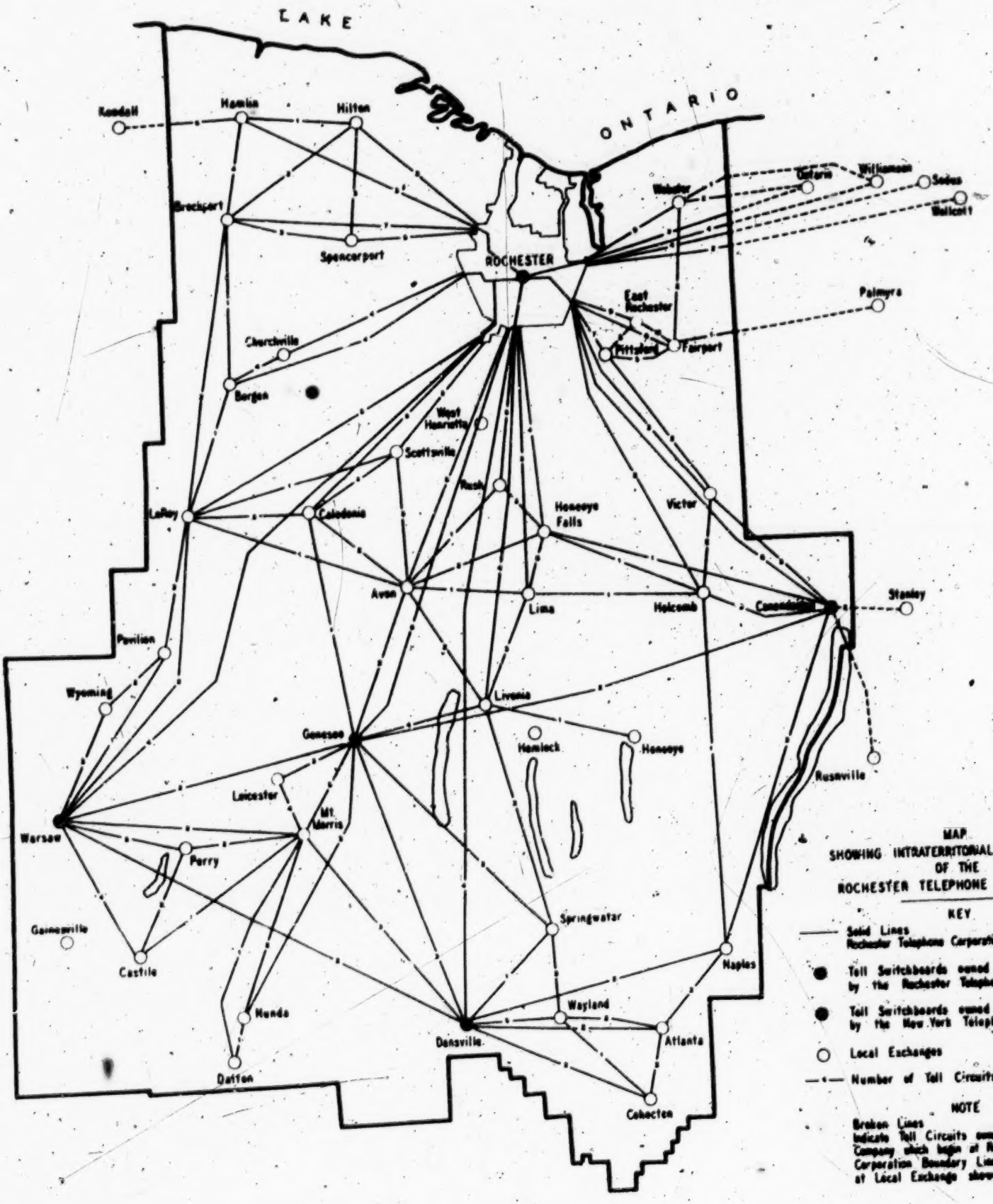
Thomas J. Hargrave, Secretary.

[fol. 635] We, the undersigned, being all the incorporators, stockholders, and directors of the Rochester Telephone Corporation, hereby waive all notice whatsoever of the first meeting of incorporators, stockholders, and directors of said corporation, and do agree and consent that the same may

be held at No. 919 Insurance Building, No. 19 Main Street, West, Rochester, New York, on the 7th day of May, 1920, at 3 o'clock in the afternoon, and that all and any lawful business may be transacted at said meeting as may be deemed advisable by the incorporators, stockholders, and directors present thereat. Dated, May 7th, 1920.

Incorporators and Stockholders	Directors
George R. Fuller.	George R. Fuller.
Fred. C. Goodwin.	Fred. C. Goodwin.
T. Carl Nixon.	Carl F. Lomb.
Fred. W. Zoller.	Frank T. Sage.
C. A. Spaulding.	T. Carl Nixon.
J. Foster Warner.	Fred. W. Zoller.
T. P. Sylvan.	P. O. Jacobs.
H. F. Stevens.	C. A. Spaulding.
W. Roy McCanne.	T. E. Lannin.
	J. Foster Warner.
	W. B. Woodbury.
	John Craig Powers.
	T. P. Sylvan.
	H. F. Stevens.
	W. Roy McCanne.

(Here follow two photolithographs, side folios 636 and 637-688)



MAP
SHOWING INTRATERRITORIAL TOLL SYSTEM
OF THE
ROCHESTER TELEPHONE CORPORATION

KEY

—— Solid Lines
Rochester Telephone Corporation Toll Circuits

● Toll Switchboards owned and operated by the Rochester Telephone Corporation

● Toll Switchboards owned and operated by the New York Telephone Company

○ Local Exchanges

—•— Number of Toll Circuits

NOTE

Broken Lines
Indicate Toll Circuits owned by Connecting Company which begin at Rochester Telephone Corporation Boundary Line and Terminate at Local Exchange shown.

410A

APPLICATION FOR THE USE OF PLANT FACILITIES.

New York Telephone Co. No. 26873

Rochester Telephone Corp. No. 26873

637-688

Dated July 26, 1935

To Rochester Telephone Corporation

The undersigned, hereby makes application for the use, subject to the terms and conditions of the General Agreement with your Company dated January 1, 1923 ____ 1923, and in accordance with the rental rates listed in Schedule 1, of the following facilities for the purpose stated:

Lease of all floor space at the Main Office, Rochester, N. Y., as per detail below.

E R Bruce

By Division Plant Superintendent

To New York Telephone Company

The undersigned hereby accepts the above application of your Company and hereby lets to your Company the facilities specified therein until such time (estimated and specified for the guidance of your Company as _____) as the undersigned may require such facilities for its own use or until such time prior thereto as additional facilities are constructed or the requirements of your Company otherwise provided for.

The rental for such facilities shall commence from the day the same or any part thereof are used by your Company and shall be payable monthly in advance during the continuance of this lease at the following rates per annum:

Location	No. of Sq. Ft.	Rate per Sq. Ft.	Annual Rental
Toll Operating Room	3693.64	$1.50	$5,540.46
2 Class Rooms 3rd Floor	493.28	1.50	739.92
Traffic Manager's Office	168.86	1.50	845.30
Operators Quarters (1/3 of 4239.41 sq. ft.)	1413.14	1.50	2,119.71
Terminal Room	216.0	1.50	324.00
Toll Test Board	180.0	1.50	270.00
	4 158.3		
Total Annual Rental			$9,837.48
Monthly Rental			$ 769.79

ROCHESTER TELEPHONE CORPORATION

Rental to begin August 1 1935. By H. W. Waman

VICE-PRESIDENT.

Previously executed Permits for the Use of Plant Facilities hereby cancelled as follows:

West. Div. Corp #185
400 - May 1925
CHP MD

4101

[fol. 689] 19036

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON, D. C.

Docket No. 3293

In the Matter of ROCHESTER TELEPHONE CORPORATION,
ROCHESTER, NEW YORK

Submitted September 28, 1936. Decided November 18, 1936

Headnotes

(1) The burden of proof is upon the carrier claiming exemption under Section 2 (b)(2) of the Communications Act to show that it comes within the exception provided in the statute;

(2) The phrase "directly or indirectly controlling or controlled by, or under direct or indirect common control with", as used in Section 2 (b) (2) of the Communications Act, contemplates a mixed question of fact and law to be determined in each case;

(3) The term "control" as used in Section 2 (b)(2) of the Communications Act means and includes actual control, as well as legally enforceable control, and also means and includes the power to exercise control;

(4) Held: The Rochester Telephone Corporation, as a wire telephone carrier, is subject to all the common carrier provisions of the Communications Act of 1934.

Appearances

T. Carl Nixon on behalf of Rochester Telephone Corporation.

Frank Roberson and James L. McDowell on behalf of the Commission.

REPORT OF THE COMMISSION

By the COMMISSION:

Telephone Division: Commissioners Walker, Chairman, Brown and Prall

This is a proceeding to determine whether the Rochester Telephone Corporation is a carrier subject to the jurisdiction

[fol. 690] of this Commission under all common carrier provisions of the Communications Act of 1934 (hereinafter called the Act) or, is a connecting carrier engaged in interstate communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier, within the meaning of the provisions of Section 2 (b)(2) of said Act, and, as such, is exempt from jurisdiction of this Commission, except as to the provisions of Sections 201-205 of the Act. Also to determine whether the Rochester Telephone Corporation in furnishing wire facilities and services to broadcasting companies for broadcasting purposes is thus engaged in interstate commerce as a wire communication carrier in a manner not "solely through physical connection with the facilities of another carrier", as provided in Section 2 (b)(2) of the Act, and, therefore, is for that reason subject to jurisdiction under all provisions of the Act.

This proceeding arose upon an order issued by the Telephone Division, October 9, 1935, and amendment thereto, under date of November 13, 1935, requiring the Rochester Telephone Corporation, hereinafter called the respondent, to show cause, on a day certain, why it should not be required to file responses to Telephone Division Orders Nos. 1, 2, 3, 4, 5, 6, 6A, and 9.[1]

The respondent filed its verified answer to said order to show cause and therein, among other things, alleged that it is a corporation duly organized and existing under and by virtue of the laws of the State of New York; that it is engaged in interstate or foreign communication solely through physical connection with the facilities of the New York Telephone Company, hereinafter called the New York Company; that said New York Company is not directly or indirectly controlling or controlled by, or under direct or indirect common control with, the respondent; that the respondent

[1] Telephone Division Orders Nos. 1, 2, 3, 5, 6-A and 9 are general orders of the Telephone Division, directed to wire telephone carriers subject to the Act, requesting certain detailed information described in the Orders. Order No. 6 was issued pursuant to Section 202 of the Communications Act and is an Order to which a connecting carrier must respond. These orders are set out in full in Federal Communications Commission Reports, Vol. 1, at pages 33-50.

failed, neglected and refused to file responses to Telephone Division Orders. Nos. 1, 2, 3, 5, 6A and 9, because such Orders are not applicable to or binding upon it; that it filed its response to Order No. 6; that it has heretofore made formal application to the Commission for an order or decision that it is not subject to the jurisdiction of the Commission nor bound to comply with all the common carrier provisions of the Communications Act, except in so far as Sections 201-205 thereof apply; that said application is still pending and undetermined; and, that the respondent "respectfully requests that a final order or decision be made determining that it is a 'connecting carrier' within the definition contained in Section 3 (u) of the Communications Act of 1934, and that it is exempted under Section 2 (b)(2) of said Communications Act of 1934 from the provisions of said Act except in so far as Sections 201-205 of said Act, both inclusive, may apply to it".

At the hearing before an Examiner the respondent filed a special appearance for the purpose of denying the jurisdiction of the Commission. It contended that it is specifically exempted from the operation of the Act and the jurisdiction of the Commission, except as to Sections 201-205, inclusive, [fol. 691] by reason of the provisions of Section 2 (b)(2) of the Act; that the burden of proof is on the Commission to show that respondent does not come within the statutory exemption; and, that there is no presumption that it comes within the jurisdiction of the Commission and that "there is now no proof before the Commission which shows that the respondent is subject to its jurisdiction".

The Examiner overruled this contention as to burden of proof, and proceeded to a hearing of the cause.

This question was fully discussed and decided by the Commission in its opinion in re Intrastate Telephone Company, Galesburg, Illinois, (Docket No. 3310, Decided August 13, 1936), in which it was held that the law is well settled that when a legislative act is passed conferring upon a body jurisdiction over the things enumerated therein and providing an exception upon certain specified conditions, the burden is upon the party claiming the exemption to show that he comes within the exception provided in the statute.

We are of the opinion that there is nothing of record here which would warrant us in changing our decision on this question.

The Examiner filed his report to which the respondent filed exceptions; the matter was argued orally and briefs have been filed.

The principal question to be determined in this proceeding is whether or not the respondent is under the direct or indirect control of the New York Company.

The material witnesses for the respondent were Fred C. Goodwin and John P. Boylan, both residents of Rochester and officers of respondent. Fred C. Goodwin is a lawyer, senior member of the law firm representing respondent on this hearing, and is Chairman of the Board, Member of Executive Committee and voting Trustee of respondent corporation, and John P. Boylan is President, General Manager, Director, Member of Executive Committee and Voting Trustee of the respondent.

History of Transaction Leading up to Incorporation of Respondent

The record discloses that during the years immediately preceding 1913 many of the independent telephone companies throughout the United States became involved in financial difficulties and the American Telephone and Telegraph Company and its Bell subsidiaries by purchase acquired and consolidated them with the Bell System to such great extent that complaint was filed with the Attorney General of the United States. The Federal Government, in order to prevent the acquiring of a complete monopoly in the telephone communication industry, took steps to prevent the further acquisition of properties of independent companies by the Bell System as in violation of the Sherman Anti-Trust Laws of the United States.

In order to avoid difficulties with the government because of these practices, I. N. Kingsbury, Vice President of the American Telephone & Telegraph Company, held conferences with the Attorney General, resulting in an agreement [fol. 692] in the form of a letter dated December 19, 1913, written by Mr. Kingsbury to the Attorney General, which is commonly called the "Kingsbury Commitment". This agreement was designed and intended for the purpose of avoiding further extension of the monopoly of the American Telephone & Telegraph Company, and provided, among other things that:

"Neither the American Telephone & Telegraph Company nor any other company in the Bell System will hereafter ac-

quire, directly or indirectly, through purchase of its physical properties or of its securities, or otherwise exercise dominion or control over any other telephone company owning, controlling or operating any exchange or line which is or may be operated in competition with any exchange or line included in the Bell System or which constitutes or may constitute a line or portion of any system so operated in competition with any exchange or line included in the Bell System."

At this time, 1913, and to the time of incorporation of respondent, the New York Company was operating in competition with several large independent companies in the State of New York, chiefly the Federal Telephone & Telegraph Company (hereinafter called the 'Federal Company'), at Buffalo; the Rochester Telephone Company (hereinafter called the 'Old Company') at Rochester, and the Home Telephone Company, at Jamestown.

The New York Company desired to acquire the properties of the Federal Company and to effect this purpose in April 1916, entered into an agreement with the Federal Company for the purchase of all its properties. However, consummation of this deal at the time was prevented and delayed by the action of the U. S. Department of Justice and the terms of the "Kingsbury Commitment".

In order for the New York Company to effect this purchase and acquisition, it was necessary first to procure the approval of the Department of Justice, and it was believed that in order to accomplish this, some plan would have to be devised and offered whereby it could be shown that if the New York Company was permitted to purchase the properties of the Federal Company, it would at the same time relinquish and dispose of approximately the same amount the of its own facilities to other independent companies, and thus the monopoly of the Bell System in the telephone field would not be increased.

In 1916 the Federal Company had about 35,000 stations, and the New York Company owned about the same number of stations in the combined area of the Rochester and Jamestown territories. Accordingly, a plan was devised to form new independent companies at these places, to which the local properties of the New York Company, could be transferred. This plan and proposition was submitted by Mr. Kingsbury to the U. S. Attorney General in a communica-

tion dated November 9, 1917, which stated in part that "public approval" of the plan had already been expressed in the various company territories involved, and requested the approval of the plan by the Department of Justice. [fol. 693] To this letter the Attorney General replied under date of January 11, 1918, stating in part that "assuming all facts and conclusions stated to be true the proposed plan, taken by itself, would not in the opinion of the department be contrary to the commitment".

Treating the above statement of the Attorney General as full approval of and consent to the proposed acquisition and consolidation of the companies mentioned, and as provided in the plan, the New York Company proceeded to carry the plan into effect.

In furtherance thereof, under date of February 25, 1918, a pre-organization agreement was made and entered into by and between George R. Fuller, W. Roy McCanne and Frederick W. Zoller (officers of the 'Old Company'), as individuals, the 'Old Company', and the New York Company, and an agreement supplemental thereto, dated March 1, 1920, between the same parties, in which it was agreed, among other things, that a new corporation, to be known as the Rochester Telephone Corporation, should be formed to take over all the properties of both the 'Old Company' and the New York Company in the City of Rochester and contiguous territory described in the agreement.

The New York Company agreed and obligated itself, under certain definite conditions, to provide all the cash money required in the purchase of the various designated properties and for the payment of all expenses incurred in consummating the entire transaction. This was done by employing Fuller, McCanne and Zoller, and making payment of the required amount to them as compensation for the performance of certain specified services preliminary and essential to completion of the transaction.

The agreement required the individual parties, among other things, (1) to secure and effect within the territory of a preponderance of public sentiment in favor of the consolidations contemplated by the agreement; (2) to, within 21 months after the Federal New York Company consolidation, obtain from the Department of Justice its written consent to the sales, purchases and consolidations; (3) to use their best endeavor to affect the sale and conveyance of all properties of the 'Old Company' (of which they were officers

and directors) to the new company; (4) to incorporate the Rochester Telephone Corporation in accordance with the terms of the agreement; (5) to do everything in their power that might be necessary or desirable to secure approval of the Public Service Commission of schedule of rates already fixed upon in the agreement; (6) to purchase, of the total of 1000 authorized shares, 665 shares of common stock of the new corporation for cash at par @ $100, and also (7) that they must present to the New York Company satisfactory proof of complete performance of all designated services, and provided that upon their so doing the New York Company would pay them for such services the sum of $70,000, it being expressly stipulated that of this amount $66,500 was to be used by the parties in the purchase of the 665 shares of common stock, and that such stock must be immediately deposited and held in a voting trust and that the remaining 335 shares of common stock be sold to, and purchased by, the New York Company at par, for cash.

[fol. 694] The agreement also expressly provided that the full performance of these specified services, and the complete compliance with and carrying out of each and every one of the terms, provisions and conditions of the agreement, and particularly the purchase and acquisition of the Federal Company by the New York Company in accordance with the terms of their agreement of April, 1916, were expressly made to *be* conditions precedent to performance of, or obligation under, any provisions of the agreement by, or on the part of, the New York Company.

There appears no convincing explanation of record why the services of the individual parties, particularly as to (1) and (2), were necessary.

Capitalization and Organization

The record shows that the respondent was incorporated February 14, 1920, for the purpose of acquiring and consolidating the properties of the New York Company and the 'Old Company' in the prescribed territory and began operation on August 1, 1921.

The consolidation was effected by respondent taking over the properties of both the 'Old Company' and the New York Company at appraised valuation approved by the New

York Public Service Commission, in accordance with the provisions of the pre-organization agreement.

The valuation of the 'Old Company' was fixed at $1,600,000, subject to bonded mortgage indebtedness of $1,058,000, which amount was paid with bonds issued by respondent for that purpose, which have since been retired.

The properties of the New York Company were valued at $4,814,000 and were paid for by respondent with preferred (now designated as Second Preferred) stock for the full amount at par value.

By certificate of incorporation, the respondent was authorized to capitalize for $7,000,000 and to issue 70,000 shares of stock of the par value of $100 each, consisting of 1000 shares of Common (full voting) stock, and 69,000 shares of 5 per cent cumulative Preferred stock.

Six years later, on March 26, 1926, the respondent, being in need of additional capital, obtained authorization to increase its capitalization to $12,000,000 and to issue 50,000 shares of 6-6½ per cent cumulative Preferred stock, each of the par value of $100, which, under certificate of authorization, was classified as First Preferred stock, and the original Preferred stock was reclassified as Second Preferred.

Of the $12,000,000 (120,000 shares) of capital stock authorized but 71,966 shares, of total par value of $7,196,000, have been issued and are now outstanding, and are held as follows:

665 shares (66.5 per cent) of the Common (full voting) stock are held by Fred C. Goodwin and deposited in voting trust as per pre-organization agreement with the New York Company.

[fol. 695] 335 shares (33.5 per cent) of Common stock and 48,140 (of all of the issued and outstanding) shares of Second Preferred stock are owned by the New York Telephone Company.

22,826 shares of First Preferred stock (all that has been issued), and bonds in the amount of $6,238,000, are outstanding in the hands of the public.

Thus, it is noted, that more than 67 per cent of all issued and outstanding capital stock of the respondent corporation is owned by the New York Telephone Company, and this holding consists wholly of 33.5 per cent of the Common (full voting) and 100 per cent of the Second Preferred stock, the latter also having voting powers and privileges as hereinafter noted.

The common stock is designated as 'voting' stock; however, its usual majority voting power is expressly limited by provisions of the certificate of incorporation which provide, in substance, that in all major matters (other than those classed as routine business) and including such matters as the increase or reduction of capital stock, the issuance of preferred stock other than in the certificate provided, and the alteration or amendment of the certificate, "no vote or consent of stockholders shall be or become effective unless concurred in by the affirmative vote of at least eighty per cent (80%) of the outstanding Common stock."

It is also provided that the Second Preferred stock has equal voting power with the Common stock, except for election of directors, or adoption or amendment of by-laws, unless or until default in payment of dividends, in which event it has full voting power.

The First Preferred stock which is in the hands of the public neither has, nor can acquire, any voting power or privilege.

It is also provided that the Second Preferred stock is entitled to priority over the Common stock to the full extent of its par value upon distribution of the assets of the corporation in the event of insolvency or dissolution, and its pro-rata share with the Common stock in any surplus assets remaining after the Common stock has been repaid to the full extent of its par value, and both the Common and Second Preferred stock are limited to 5 per cent dividend but share equally in any extra dividend up to 3 per cent additional and, in case of dissolution or sale, share equally in assets remaining after payment to all stockholders the full amount of their stock at par.

The Second Preferred stock is not redeemable, no provision for redemption being made in either the certificate of incorporation or of reclassification, but the First Preferred stock may be redeemed at any time on any dividend payment date at 10 per cent above par plus unpaid accumulative dividends.

Witnesses, officials of respondent, acknowledge and admit the fact that by reason of its holding of Second Preferred and Common stock the New York Company can now, in all major matters, exercise voting control "many times" over and can do so in all matters if and when the Second Pre- [fol. 696] ferred stock attains full voting power, but assert

that "it is not likely that the Second Preferred stock will ever come into full voting power" for the reason that on its present outstanding capitalization the respondent's annual dividend requirement amounts to $389,069; it has a surplus of $1,298,490 and, on the basis of earnings equal to the average of the last three years, the respondent will be able to pay prescribed dividends on both issues of Preferred stock, out of surplus, for at least forty years.

It is claimed by witnesses for the respondent that "it is not likely" that any proposition or occasion requiring the 80 per cent vote or consent of all Common stock will arise for the reason that, of the Preferred stocks and bonds already heretofore authorized, approximately $6,000,000 worth have not been issued and these may be issued by respondent at any time without further authority or consent of the New York Company; and that no need of, or action on, any other matter requiring such 80 per cent vote, "is contemplated".

That this power has been exercised on occasion is admitted. The record shows that the action authorizing the issue of these stocks and bonds required and received affirmative approval of at least 80 per cent of the Common stock vote, without which it could not have been authorized.

In this behalf respondent also contends that even though a full one-third of the Common stock and all of the Second Preferred stock is held by the New York Company, it is thereby vested with no power to control because neither party can at any time muster 80 per cent of the Common stock vote without the aid or consent of the other and that, therefore, such power of control as it may possess is at best a negative or veto power which is equally possessed by both parties, and enables either to block the other on any such major proposition which might arise, and that, therefore, the New York Company has no such control over the affairs of the respondent as contemplated in, or within the meaning of, the provisions of Section 2(b)(2) of the Act.

The contention places squarely before us for decision the question whether the term "control" as used in Section 2(b) (2) of the Communications Act of 1934 shall be construed to include and mean the "power to control".

The record discloses that the consolidation was accomplished and completed in accordance with the terms of the agreement and that upon effecting consolidation of the properties of the New York Company and the 'Old Com-

pany' the 1000 shares of Common stock of the respondent company were issued as follows: To Geo. R. Fuller, trustee, 645 shares; to W. Roy McCanne, 10 shares; to Fred C. Goodwin, 10 shares; to Tage P. Sylvan, Vice President of the New York Company and one of the incorporators of respondent, 10 shares, and to New York Company, 325 shares. Thus the 665 shares of Common stock, purchased with funds provided by the New York Company and paid to the three individuals for services as per agreement, were divided among Fuller, McCanne and Goodwin.

It is to be observed that, although purchased with money paid him for alleged services, this stock was not issued to Fuller in his own right but as trustee. For whom he was to hold and control the trust is not definitely nor satisfactorily disclosed by the record.

[fol. 697] In this same connection witness Goodwin testified that Fuller made him a present of 270 shares of this stock and that he purchased some for $80 per share; that these 665 shares of Common stock were deposited under voting trust agreement, 375 shares in the name of Fuller, 280 shares in the name of Goodwin and 10 shares in the name of McCanne, which same parties became and were voting trustees and remained so until the time of the death of Fuller and McCanne. Fuller died in 1926 at which time the stock standing in his name as trustee passed to Goodwin and McCanne, jointly, and J. Foster Warner was appointed voting trustee in his place; McCanne died in 1934 and all stock held by him was acquired by Goodwin, and John P. Boylan, President, General Manager and Director, was made voting trustee in place of McCanne.

Fred C. Goodwin became, and is now, the owner of voting trust certificates of all the Common voting stock of the respondent corporation, except the 335 shares owned by the New York Company, and, although owned by one individual, this stock is still deposited in voting trust under the trust agreement which expired on August 1, 1936, but which, it is alleged, was to be re-executed for another ten-year period, the three voting trustees being Mr. Goodwin, John P. Boylan and J. Foster Warner.

It is noted that Zoller, one of the three individuals party to the pre-organization agreement, does not appear to have received any part of this stock for his part in the transaction, and no explanation or reason therefor appears in the record.

The depositing and holding of this stock in a voting trust was one of the conditions imposed by the New York Company in the pre-organization agreement and was allegedly for the expressed purpose of assuring control being retained by the "independents".

In analyzing the capitalization of respondent, it is noted that while $7,000,000 of stock was authorized only $100,000 thereof was Common (voting) stock.

We are not unmindful that in the growth and development of modern corporate structure the means employed to retain control has often been the issuance of a small amount of stock with voting rights although the financing of the business was largely provided by the sale of preferred stock without voting rights, and bonds to the general public.

The record discloses that the 'Old Company' had no other than Common stock authorized or outstanding and its ownership was wide spread among the citizens of Rochester who, it is alleged, are highly prejudiced against the New York Company and all other Bell interests.

It appears that five of the nine original incorporators who subscribed for common stock were prominent citizens of Rochester, but none of them ever received any stock, and that of the board of fifteen directors ten, including Goodwin, are prominent citizens of Rochester, but not one of them, excepting Goodwin, has ever owned a single share of voting stock, but serve on the Board of Directors "as a matter of civic interest".

In explanation of the object and purpose of provision for so small amount of Common stock, the witness Goodwin says that it was desired by all parties to the consolidation agree- [fol. 698] ment that the new company (respondent) should be run by the same men who had been running the 'Old Company', (Fuller, McCanne and Zoller), and to do this it was necessary that they have two-thirds of the Common stock, but they had no money to pay for it, and:

"this was a case of having to provide a means whereby the tail could wag the dog. So we talked it all out and we agreed we would have a Common stock of $100,000, of which we local men should take two-thirds and the New York Company one-third, that it should all be paid for at par, $100 per share, but that in order to provide the local men with the money to make the payment for two-thirds the

New York Company would pay them for their services $70,000."

and that although it is unusual to have so small an amount of Common stock in so large a company "unusual conditions demand unusual remedies".

This witness also stated that these same three men had "run" the business of the 'Old Company" continuously to the time of this consolidation, but that, financially, the company was never successfully operated. That in 1905 an effort was made by the local people of Rochester to sell the 'Old Company' to the Bell, and a contract was executed but the deal was enjoined by the Attorney General of New York as in violation of the Sherman Anti-Trust Act, and "again in 1911 we made another effort to sell to the Bell and that was enjoined by our friends in Buffalo".

However, the witness further testified that the 'Old Company' was a real competitor of the New York Company; did as much or more business and enjoyed, to a much larger extent, the good will of the local public, and it was as greatly to the interest of the New York Company that this competition be eliminated as it was to the people that the service be unified.

The fact cannot be ignored that every dollar that went into the financing of respondent was, in the last analysis, furnished by the New York Company.

That the New York Company would, under these circumstances, have failed to provide some adequate means to control fully the affairs of the respondent and thus insure protection of its investment is contrary to common business sense and judgment.

Management and Operation

The affairs of respondent are governed by a Board of Directors consisting of fifteen men, of whom ten are named by the voting trustees and five by the New York Company, and an Executive Committee consisting of five directors, of whom three are named by the voting trustees and two by the New York Company. Provision is made in respondent's articles of incorporation for cumulative voting in the election of Directors and Executive Committee members to insure the New York Company's representation in ratio as above stated.

[fol. 699] The territory served by respondent covers an area of approximately 1,986 square miles, all in the State of New York. The population of this entire territory is about 500,000 of which 328,000, or more than 65 per cent, reside in the City of Rochester. Within its territory respondent maintains and operates approximately 39 switchboard exchanges and 94,000 stations. Seven of these exchanges and approximately 80,000, or more than 80 per cent, of the total number of stations are located and maintained in the City of Rochester.

Besides its regular telephone service, the respondent leases wire circuits to two radio broadcast stations in Rochester to provide connection between their studios and transmitters, and also leases circuits for 'spot locations' at various points in the city. The wires for the 'spot locations' pass through cables and the 'terminating frames' in the central office of respondent and terminate in the station studio. The respondent does not furnish any electrical energy for the transmission of programs over many of these circuits but leases merely 'dead' wires.

The record shows that at, and prior to, the time of the consolidation of the 'Old Company' and the New York Company, each owned its own central office building in Rochester where each owned and operated its own switchboards, lines and facilities for both local and toll service, and its various connecting exchanges throughout the territory, each having about the same number of stations and doing approximately the same amount of business. Neither company was physically connected with the other and each completed its own intraterritorial calls, both local and toll, entirely with its own facilities.

Pursuant to the terms of the consolidation agreement, the respondent acquired all of the properties (both real and personal) of both companies located in the prescribed territory, including, of course, all exchanges and their connecting lines and equipment, except the toll switchboard and through toll lines owned by the New York Company.

Thus, the respondent was, by the acquisition and physical joinder of these two going concerns, fully constituted and equipped to furnish the public both local and long distance service through its territory entirely with its own facilities.

Respondent owns and operates its own switchboards, for both local and toll service, at all points of operation within its territory, except in the City of Rochester where it has

no toll board although it there has and maintains seven otherwise completely equipped switchboard exchanges.

Throughout its territory respondent handles all of its local calls entirely with its own equipment and, by reason of the fact its exchanges are all inter-connected, many of its intra-territorial toll calls originating and terminating in the territory outside of, and not necessarily routed through, Rochester are also handled and completed entirely through respondent's own facilities.

[fol. 700] Because of the fact that respondent has no lines crossing state boundary lines or extending beyond the limits of its territory, all of its extra-territorial and interstate traffic is necessarily conducted through and by means of the facilities of the New York Company, with which respondent has physical connection for that purpose, under terms and provisions of a standard Bell traffic agreement which provides for interchange of communications and division of charges.

As to the volume of this particular type of business, it is testified that during the year 1935 a total of 647,000 toll calls originate within and terminated outside of respondent's territory, all of which were handled by the New York Company through its Rochester toll board. It is also testified that during the same period there was a total of 221,000 toll calls which both originated and terminated within the respondent's territory outside of Rochester, all of which were handled by respondent entirely with its own facilities.

The respondent through its various exchanges in the territory outside of Rochester is equipped and able to handle and complete all intra-territorial toll calls without assistance from the New York Company, or use of facilities other than its own, but it is not able to handle and complete entirely with its own facilities any intra-territorial toll call that either originates or terminates in the City of Rochester, because it does not now own or operate a toll switchboard in the City of Rochester.

The toll switchboard in Rochester is now owned and operated by the New York Company, which does not own or operate any other exchange or board anywhere in the Rochester territory, and all of respondent's intra-territorial toll calls, originating or terminating in Rochester, are handled by the New York Company through its switchboard, on a flat rate per message basis. The amount paid

by respondent to the New York Company for handling these intra-territorial toll calls is fixed by the terms embodied in what the parties designate as a "facilities" agreement, executed on March 17, 1933, and which is entirely separate and distinct from the traffic agreement relating to interstate tolls.

This facilities agreement provides that respondent shall pay to the New York Company for its services in handling those calls $.2408 for each message ticketed by New York Company operator at the toll board and $.0250 for each message ticketed by respondent's operator at its "A", or local exchange, board, and in addition thereto shall pay to the New York Company the sum of $323.93 rent for "tandem equipment and floor space", used for the purpose of handling these calls.

The testimony of record discloses that respondent's charges for these intra-territorial toll calls range from a minimum of 15 cents to a maximum of 40 cents per message.

The respondent attempts to justify its failure and inability to handle this traffic itself, with its own facilities, upon the ground (1) that to have two telephone systems and two toll switchboards in the same city is impracticable, both from the standpoint of the public and the telephone companies because if there were more than one toll board, it would be confusing to know to which board a message should be directed, and (2) that it would not be feasible for the respondent to have the terminal of its toll lines in [fol. 701] its own office as this would require the extension of the toll lines to every office in the city.

On the oral argument before us counsel for respondent stated that if the facts as to the operation of the Rochester toll switchboard, and the method of handling the intra-territorial toll traffic originating or terminating in Rochester, were to be given much weight as a factor in reaching our conclusion, he desired to request a reopening of the case to afford respondent an opportunity to show that this arrangement under the facilities agreement was to its financial advantage.

In our opinion the fact that all of respondent's intra-territorial toll traffic, originating or terminating in Rochester, is handled by the New York Telephone Company, is a circumstance of minor importance and not at all decisive of the question of control in this case. In reaching our

conclusion we have considered it only as a circumstance without which our ultimate decision would be wholly unaffected. Therefore, any additional evidence which might be presented on this point could here be of no material value.

Whether the respondent corporation is controlled by the New York Company, within the meaning of Section 2(b)(2) of the Act, is a question the determination of which involves and necessitates consideration of all relevant facts appearing of record, and the application of the Act thereto.

This is in line with the statement of the Telephone Division of this Commission in its report in Docket No. 2809, issued September 18, 1935, that "the phrase 'directly or indirectly controlling or controlled by, or under direct or indirect common control with' as used in Section 2 (b)(2) of the Act, contemplates a mixed question of fact and law to be determined in each case heard and considered by the Commission."

The record shows that although the New York Company owns more than 67 per cent of the total outstanding capital stock of the respondent corporation, it owns only 33.5 per cent of the outstanding Common (full voting) stock.

Respondent claims that it is not controlled by the New York Company, within the meaning of Section 2(b)(2) of the Act, because, it contends, "control" is a matter of what one, in the exercise of lawful rights, can do, and, therefore, the term "control", as used in the Act, should be construed to mean legally enforceable control as distinguished from actual control.

In this connection it is insisted that the use of the words "controlling" and "controlled by", as used in Section 2(b)(2) of the Act, was intended to describe a relation wherein one carrier has the power to dictate, direct, govern, and regulate the corporate acts of another; that such power to control is vested only in, or by, the holder of a majority of the Common (full voting) stock, and that the controlling company must not only have the power to control, but must also be affirmatively exercising that power in acts of dictation and direction of the company's affairs.

The respondent also alleges that the New York Company, holding less than a majority of the Common stock, has no power to, and does not, affirmatively exercise control over the respondent, and contends that the holder of a majority

of the outstanding Common stock controls that corporation despite the fact that such majority Common stockholder [fol. 702] could not compel the corporation to perform certain corporate functions without the consent of the New York Company. In support of this position, the respondent cites and refers to various authorities. We have reviewed these decisions.

The same question here presented was involved and decided by the Commission In Re Intra State Telephone Company, Docket No. 3310, decided August 13, 1936, 3 F. C. C. —. Reference is here made to the Report of the Commission filed in that case, wherein the question of control, and the meaning of the term as used in Section 2 (b)(2) of the Act, is fully discussed. What was said in that case is applicable here.

In that case it was determined, and said, that the question of control is one which cannot be categorically determined by any mathematical formula, and the facts and circumstances surrounding each particular case must govern.

The history of this legislation shows that Congress fully realized and intended that this question of "control" of one carrier by another should depend upon the facts in each individual case, and to incorporate in the Act any statutory definition of the terms used would defeat its own purpose.

Section 5 (a) of the Interstate Commerce Act, as amended June 16, 1933, provides the following:

"(9) For the purposes of paragraphs (6), (7), (8), and (11), wherever reference is made to control it is immaterial whether such control is direct or indirect. As used in this paragraph and paragraphs (7), (8), and (11), the term 'control' shall be construed to include the power to exercise control."

Obviously Congress knew of the existence of this particular provision in the Interstate Commerce Act, and inasmuch as Congress purposely refrained from defining the term, because to do so would be limiting the meaning of the term in an unfortunate manner, it may well be assumed that they considered that provision as too narrow to meet its purpose, and thus expressly intended that the Commission be given even greater latitude in ascertaining all relevant fact- pertaining to control.

It seems clear to us that in its use of the term "control", in Section 2(b)(2) of the Act, Congress meant actual as well as legal control, and intended the term also to include and mean the power to exercise control, either negatively or affirmatively; that it left open the way for the Commission to determine from the facts and circumstances in each individual case whether or not the power to exercise control in any manner or form actually exists, or is exercised.

The material evidence of record compels the conclusion that the New York Company, through stock ownership, is the dominant financial factor in the respondent company and also, that this, taken together with their contractual arrangements and other pertinent facts and circumstances appearing in the record, unquestionably gives the New York Company power to control the functions of the Rochester Tele- [fol. 703] phone Corporation.

Moreover, considering the record as a whole, we are convinced that the plan providing for the organization and incorporation of the respondent corporation, and the sale and transfer of all properties and business of the New York Company in the Rochester territory to the respondent, was designed and formulated for the express purpose of enabling the New York Company to acquire and consolidate various independent telephone companies then operating in its territory and, at the same time, also enable it to have and retain the power to control the functions of the respondent; and we are also convinced, beyond all doubt, that such purpose has been fully accomplished.

The matter of respondent's furnishing wire facilities to broadcasting companies for broadcasting purposes is not considered an element bearing on the question of control. We so held In Re the Capital City Telephone Company, Docket No. 3313, Decided August 14, 1936, 3 F. C. C. —.

Upon consideration of all the facts and circumstances appearing of record, the Examiner's Report and exceptions filed thereto, and the briefs and argument of counsel for the respondent, the Commission is of the opinion, and so finds, that the respondent, Rochester Telephone Corporation is under the control of the New York Telephone Company, and is a wire telephone communication carrier engaged in interstate communications through physical connection with the carrier controlling and, as such, is subject to the jurisdiction of this Commission under all common carrier provisions

of the Communications Act of 1934, and, therefore, not entitled to be classified as a connecting carrier under Section 2 (b)(2) of said Act.

Appropriate order will be entered in accordance herewith.

I hereby certify that the foregoing is a full, true and correct copy of the Statement of Facts and Grounds for Decision of the Federal Communications Commission in Docket No. —.

John B. Reynolds, Acting Secretary, by —— ——.

[fols. 704-717] 19021

FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C.

Docket No. 3293

In re ROCHESTER TELEPHONE CORPORATION, ROCHESTER, NEW YORK

ORDER

Pursuant to the Report of the Commission issued by the Telephone Division herein, it is hereby ordered that the Rochester Telephone Corporation, as a wire telephone carrier, be, and the same is hereby, classified as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000.

By the Commission, Telephone Division.

November 18, 1936.

I hereby certify that the foregoing is a full, true and correct copy of the Statement of Facts and Grounds for Decision of the Federal Communications Commission in Docket No. 3293.

John B. Reynolds, Acting Secretary, by M. B. Anthony. (Seal Federal Communications Commission.)

[fols. 718-745] Voting Trust Agreement, by and between Subscribing Stockholders, Voting Trustees, and Depositary, dated August 1, 1926, omitted. See Exhibit 12, printed side page 538, ante.

[fol. 746] In United States District Court for the Western District of New York

Rochester Telephone Corporation, Petitioner,

against

The United States of America and Federal Communications Commission, Respondents

Before Martin T. Manton, Circuit Judge, and John Knight and Harold P. Burke, District Judges, Constituting a Statutory Court Convened Pursuant to the Provisions of § 402(a) of the Communications Act [48 Stat. 1093; 47 U. S. C. A. § 402(a)]

Suit in equity to set aside an order of the Federal Communications Commission, classifying the petitioner as a wire telephone carrier subject to its jurisdiction and directing that it file certain reports. Decree for respondents.

T. Carl Nixon, Attorney for Petitioner; Justin J. Doyle, of counsel.

Hampson Gary, General Counsel for Federal Communications Comm.; James A. Kennedy, Asst. General Counsel; Elizabeth C. Smith, Asst. Counsel.

Robert M. Cooper, Special Assistant to the Attorney General; Thurman Arnold, Asst. Atty. General; Wendell Berge, John J. Abt, Special Assistants to the Attorney-General.

[fol. 747] Opinion—Filed June 24, 1938

Manton, Circuit Judge:

This suit is brought to set aside an order of the Federal Communications Commission which directs petitioner to comply with certain orders of the Commission. 47 U. S. C. A. § 402(a). The United States is made a party (§ 211 of the Judicial Code; 28 U. S. C. A. § 48). The petitioner maintains that it is not subject to such supervision because of § 2(b)(2) of the Communications Act of 1934 (48 Stat. 1093; 47 U. S. C. A. § 402[a]) which provides:

"Subject to the provisions of § 301, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to * * * (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier

not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; except that sections 201 to 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2)."

By § 402(a) "the provisions of the Act of October 22, 1913 (38 Stat. 219) relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission" are applicable to suits to enforce or set aside any order of the Commission under the Communications Act.

Between July 20, 1934 and September 13, 1934, the Communications Commission promulgated general orders Nos. 1, 2, 3, 5, 6, 6a and 9 which required telephone carriers subject to its jurisdiction to report information regarding their operations and corporate structure to the Commission. [fol. 748] Petitioner failed to comply with these orders and ultimately, after notice and a hearing, was classified by the Commission as a wire telephone carrier subject to all common carrier provisions of the Communications Act and therefore subject to all general orders of the Commission applicable to such carriers.

The questions presented are: (1) what type of influence and control Congress intended to include by the phrase "directly and indirectly * * * controlled by" as used in § 2(b)(2) of the Act; and (2) whether the petitioner is directly or indirectly controlled by the New York Telephone Company within the same section. Section 2(a) makes all carriers engaged in interstate or foreign commerce by wire or radio, subject to the provisions of the act. But § 2(b)(2) exempts petitioner from the Commission's jurisdiction if it is engaged in interstate and foreign communications solely through physical connection with the facilities of another carrier and is not directly or indirectly controlled by such other carrier. Petitioner is concededly engaged in interstate and foreign communications solely by wire through its physical connections with the facilities of the New York Telephone Company, and the latter is a carrier subject to the jurisdiction of the Communications Commission.

It is essential to find what meaning Congress intended by the use of the word "control" in the statute. The report of the Committees of Congress may be consulted to find the Congressional intent. Woodward v. Graffenreid,

238 U. S. 284; Lapina v. Williams, 232 U. S. 78. From these reports it is clearly indicated that Congress intended "control" as used in the statute to be broadly construed. In [fol. 749] House Report 1850, 73 Cong., Second Session, pp. 4, 5, it is stated:

"No attempt is made to define 'control', since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control."

Congress has recognized the fact that there are many ways in which actual control may be exerted, such as stock ownership, leasing, contract and agency. Congress also realized that control may be exercised "through ownership of a small percentage of the voting stock of the corporation, either by the ownership of such stock alone or through such ownership in combination with other factors." Broadly used, "control" may embrace every form of control, actual or legal, direct or indirect, negative or affirmative. And in Natl. Gas Co. v. Slattery (302 U. S. 300) the court said (pp. 307-308):

"We have not said, nor do we perceive any ground for saying, that the Constitution requires such an inquiry to be limited to those cases where common control of two corporations is secured through ownership of a majority of their voting stock. We are not unaware that, * * * there are other methods of control of a corporation than through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry."

[fol. 750] Since provizos and exceptions in statutes are intended to restrain or except that which otherwise would be within the scope of the general language, they must be strictly construed and limited to objects fairly within their terms. The petitioner must bring itself within this exception. Schlemmer v. Buffalo, Rochester & Pitts. RR., 205 U. S. 1; Ross v. Duval, 13 Peters. 44.

Usually the management of corporate affairs is vested in the stockholders and where a majority of the voting stock is owned by another corporation, the control of the first company resides there. It may not be disputed that a minority stockholder can exercise strong influence and even control over the affairs of a corporation. See: U. S. v. Union Pac. Ry. Co., 226 U. S. 61.

The petitioner was incorporated February 14, 1920 for the purpose of acquiring and consolidating the properties of the New York Telephone Company in the Rochester territory and the Rochester Telephone Company. The petitioner took over the properties of both at an appraised valuation, approved by the New York Public Service Commission, in accordance with the provision of a reorganization agreement. The Rochester Telephone Company's valuation was fixed at $1,600,000 subject to a bonded indebtedness of $1,058,000 which amount was paid with bonds issued by the petitioner for that purpose; these bonds have been retired. The properties of the New York Telephone Company in the Rochester territory were valued at $4,814,000 and were paid for by petitioner with its present second preferred stock. The petitioner was authorized to capitalize its investment at $7,000,000 and to issue 70,000 shares of stock at a par [fol. 751] value of $100 per share consisting of 1,000 shares of common (full voting) stock and 69,000 shares of 5% cumulative preferred stock. It began its operations August 1, 1921. In March, 1926, it was authorized to increase its capitalization to $12,000,000 and to issue 50,000 shares of 6 to 6½% cumulative preferred stock with a par value of $100. This was classified as first preferred stock and the original preferred stock was reclassified as second preferred stock. Of the 120,000 shares of capital stock thus authorized, only 71,966 shares with a total par value of $7,196,000 have been issued and are now outstanding. 665 shares or 66.5% of the common stock which carries full voting rights is deposited in a voting trust in accordance with the preorganization agreement with the New York Telephone Company and Fred C. Goodwin owns all the voting trust certificates issued on the deposited shares; 335 shares or 33.5% of the common stock and 48,140 shares (all) of the second preferred stock are now owned by the New York Telephone Company, and 22,826 shares of the first preferred stock and bonds in the amount of $6,238,000 are outstanding and in-

the hands of the public. Thus 67% of all issued and outstanding capital stock of the petitioner is owned by the New York Telephone Company. While the common stock is designated as "voting stock", its majority voting power is limited by the certificate of incorporation providing that in all major matters other than those that may be classified as routine business and including such matters as increase or reduction of capital stock, the issuance of preferred stock other than that provided in the certificate and the alteration [fol. 752] or amendment of the certificate will not become effective unless concurred in by an affirmative vote of 80% of the outstanding common stock. It is provided that the second preferred stock shall have "equal voting power" with the common stock but cannot vote for the election of directors or the adoption or amendment of by-laws, unless or until there is a default in the payment of dividends on the second preferred, in which event it shall have full voting power. The publicly owned first preferred stock neither has nor can acquire any voting rights or privileges. The second preferred stock is entitled to priority over common stock to the full extent of its par value upon the distribution of assets of the corporation or in the event of insolvency or dissolution. Both the common and second preferred stock are limited to 5% dividends but share equally in any extra dividends up to 3% and in case of dissolution or sale share equally in the assets remaining after the payment to all stockholders of the full amount of their stock at par value. The second preferred stock is not redeemable but the first preferred stock may be redeemed at any time on any dividend payment date at 10% above par plus unpaid accumulated dividends.

The annual dividend requirement on the outstanding stock amounts to $389,069 and the petitioner has a surplus of approximately $1,298,490 from which it appears that there is little chance of a default for a period of years. It is further argued that it is not likely there will be any occasion requiring the 80% vote or consent of all common stockholders for the reason that approximately $6,000,000 of the authorized preferred stock and bonds have not been issued [fol. 753] and these may be issued by the petitioner at any time without further authority or consent of the New York Telephone Company. But it is admitted that occasion has arisen in the past requiring an 80% vote. It is argued that

even though one-third of the common stock and all of the second preferred stock is held by the New York Telephone Company, it is not vested with power to control because none of the voting trustees who control two-thirds of the common stock nor the New York Telephone Company can at any time exercise a 80% vote of the common stock without the aid or consent of the other. From this it is argued that such power and control as the New York Telephone Company may possess is negative or a veto power which is equally possessed by both parties and enables either to block the other on any major proposal which might rise and consequently the New York Telephone Company has no such control over the petitioner as is contemplated within § 2(b)(2) of the Communications Act. Such argument, however, does not advance the petitioner.

The pre-incorporation agreement, under which the consolidation became effective, provided that three persons, Fuller, McCanne and Zoller, were to be employed at a fixed compensation to render services essential to the consolidation of the properties which included using their best efforts to effect the sale and conveyance of all the properties of the old Rochester Telephone Company to the new Rochester Telephone Corporation (petitioner); bringing about the incorporation of the petitioner; securing the approval of the Public Service Commission of New York to schedules of rates as specified in the agreement; purchasing 665 shares of [fol. 754] common stock of a total of 1,000 authorized shares; and presenting to the New York Telephone Company satisfactory proof of the performance of these services in return for which the company would pay $70,000. upon the express stipulation, however, that $66,500 of this amount was to be used by the three above named individuals in the purchase of the 665 shares of common stock. These 665 shares of common eventually came into the possession and control of Goodwin and although he is the owner of the voting trust certificates covering all the common stock of the petitioner except that owned by the New York Telephone Company, the stock is still deposited under a trust agreement which expired August 1, 1936 but which it is said will be renewed for another ten year period. It was the New York Telephone Company which imposed the condition of a voting trust agreement in the preorganization agreement.

Five of the original nine incorporators were prominent citizens of Rochester but none received any stock. Of the

fifteen members of the Board of Directors, ten including Goodwin, are prominent citizens of Rochester and no one except he has any voting stock, and they serve on the Board of Directors merely as a matter of civic interest.

The policies of the petitioner are governed by the board of directors and the executive committee consisting of five directors, three of whom are named by the voting trustees and two by the New York Telephone Company. Provision is made in the articles of incorporation for cumulative voting in the election of directors and executive committee members to insure the New York Telephone Company representation roughly proportionate to its holdings of common.

[fol. 755] The petitioner acquired all the properties, both real and personal, of both the old companies located in the prescribed territory including exchanges, connecting lines and equipment, except the toll switchboards and through toll lines owned by the New York Telephone Company. It owns and operates switchboards for both local and toll service to all points of operation within its territory except in the City of Rochester where it has no toll board although it has seven otherwise completely equipped switchboard exchanges. Petitioner having no lines crossing state boundaries, uses the facilities of the New York Telephone Company in its extra-territorial and interstate traffic. These facilities are arranged and paid for on a per message basis.

The Commission could find, as it did, that through stock ownership and as a dominant financial factor in the petitioner's organization taken together with the above contractural arrangements, the New York Telephone Company has power to control the petitioner. The plan providing for the organization and incorporation, election of directors and placing the common stock in a voting trust gave control directly and indirectly to the New York Telephone Company.

We are obliged to accord proper weight to the findings of the Commission which conducted hearings and heard argument on the questions involved. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38; Mfgrs. Ry. Co. v. United States, 246 U. S. 457. The determination of the Commission under the proof here is binding upon us. Interstate Commerce Comm. v. Ill. Central Ry. Co., 215 U. S. 452; Interstate Commerce Comm. v. Union Pac. Ry., 222 U. S. [fol. 756] 541; Florida v. United States, 292 U. S. 1. The

petitioner does not come within the exception of the statute as set forth in § 2 (b) (2) and since counsel have stipulated that a final decree may be entered upon our determination, judgment will be entered for the respondents.

Dated June 20th, 1928.

Martin T. Manton, Circuit Judge. John Knight, District Judge. Harold P. Burke, District Judge.

[fol. 757] [File endorsement omitted.]

[fol. 758] IN UNITED STATES DISTRICT COURT

[Title omitted.]

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE SUBMITTED BY DEFENDANTS, UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

These Findings of Fact, Conclusions of Law, and Decree are respectfully submitted by the United States of America and the Federal Communications Commission, as conforming to this Court's opinion, dated June 20, 1938, in the above entitled cause.

Robert M. Cooper, Special Assistant to the Attorney General, for Respondent, United States of America. Hampson Gary, General Counsel; James A. Kennedy, Assistant General Counsel; Elizabeth C. Smith, Assistant Counsel, for Respondent, Federal Communications Commission.

[fol. 759] IN UNITED STATES DISTRICT COURT

[Title omitted.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed October 21, 1938

This cause came on regularly to be heard before the undersigned Martin T. Manton, Circuit Judge, Harold P. Burke and John Knight, District Judges, sitting as a statutory three-judge court on the 18th of May, 1938, at the City of Rochester, New York; pursuant to an order of such court

upon the application of the petitioner for a permanent injunction suspending and annulling the operation of an order issued by the Federal Communications Commission through its Telephone Division, Docket No. 3293, dated November 18, 1936, classifying the petitioner as a common carrier subject to the provisions of the Communications Act of 1934 and also subject to all general orders of the Telephone Division applicable to wire telephone carriers whose gross annual operating income exceeds $50,000; and the cause having been fully argued by counsel; and the parties having stipulated in open court to submit said cause for final determination upon the pleadings, the record and exhibits before the Federal Communications Commission, and briefs on file; and the record before the Commission, the briefs and pleadings of the parties having been filed as directed; and this Court having been fully advised in the premises, and an [fol. 760] opinion in writing having been delivered by Judges Manton, Burke and Knight, this Court, pursuant to Federal Equity Rule 70½, now makes the following:

Findings of Fact

I.

The allegations and admissions set forth in Sections 1, 2, 6, 7, 8, 9, 10 and 11 of the Bill of Complaint of the petitioner, and the Answers of the United States of America and of the Federal Communications Commission to said respective Sections of said Bill of Complaint are true.

II

The Order of the Telephone Division, Docket No. 3293, dated November 18, 1936, classifying the petitioner as a common carrier subject to the provisions of the Communications Act of 1934, was issued by the respondent Federal Communications Commission after a hearing and the taking of considerable evidence and the conclusions of the Commission are set forth in a decision accompanying the Order which is a part of the record in this proceeding.

III

This is a suit of a civil nature, in equity, which arises under the Constitution and the Laws of the United States, and is a suit to set aside, annul and enjoin the enforcement

of an order of the Federal Communications Commission, through its Telephone Division, Docket No. 3293, dated November 18, 1936, classifying the petitioner as a common carrier subject to the provisions of the Communications Act of 1934 and subject to all general orders of the Telephone Division, particularly General Orders Nos. 1, 2, 3, 5, 6, 6a and 9, requiring the petitioner to report detailed information regarding its operations and corporate structure to the Commission.

IV

Prior to February, 1920, there had been two telephone companies operating in Rochester, New York, and vicinity; [fol. 761] one was the New York Telephone Company, or Bell Company, and the other was the Rochester Telephone Company, or independent company. Petitioner took over properties of both companies and consolidated them into a single telephone system. At the time of the organization of petitioner, there was in existence the so-called "Kingsbury Commitment." This Commitment was contained in a letter dated December 19, 1913, written by N. C. Kingsbury, Vice President of the American Telephone and Telegraph Company, to the Attorney General of the United States and provided, among other things, that:

"Neither the American Telephone & Telegraph Company nor any other company in the Bell System will hereafter acquire, directly or indirectly, through purchase of its physical property or of its securities, or otherwise exercise dominion or control over any other telephone company, owning, controlling or operating any exchange or line which is or may be operated in competition with any exchange or line included in the Bell System or which constitutes or may constitute a line or portion of any system so operated or which may be so operated in competition with any exchange or line included in the Bell System."

The proposed consolidation of the two telephone systems at Rochester, New York was submitted to the Department of Justice along with a proposal for the consolidation of the systems at Jamestown, New York and Buffalo, New York, in each of which cities telephone systems were being operated both by the "Bell" and an "independent" company. The agreements by which the consolidations of the several properties were to be effected were also submitted, and,

after consideration of the plans and a study of the documents, the Department of Justice stated that "assuming all facts and conclusions stated to be true, the proposed plan, taken by itself, would not, in the opinion of the Department, be contrary to the Commitment." The Rochester Telephone Corporation was incorporated February 14, 1920 for the purpose of acquiring and consolidating the properties of the [fol. 762] New York Telephone Company in the Rochester territory and the properties of the Rochester Telephone Company, which it did at an appraised valuation, approved by the New York Public Service Commission, in accordance with the provisions of a pre-organization agreement. The Rochester Telephone Company's valuation was fixed at $1,600,000 subject to a bonded indebtedness of $1,058,000, which amount was paid in cash, the cash representing part of the proceeds of an issue of bonds secured by a mortgage on petitioner's entire property; these bonds have been retired. The properties of the New York Telephone Company in the Rochester territory were valued at $4,814,000 and were paid for by petitioner with its present second preferred stock. The petitioner was authorized to capitalize its investment at $7,000,000 and to issue 70,000 shares of stock at a par value of $100 per share consisting of 1,000 shares of common (full voting) stock and 69,000 shares of 5 per cent cumulative preferred stock. It began its operations August 1, 1921. In March, 1926, it was authorized to increase its capitalization to $12,000,000 and to issue 50,000 shares of 6 to 6½ per cent. cumulative preferred stock with a par value of $100. This was classified as first preferred stock and the original preferred stock was reclassified as second preferred stock. Of the 120,000 shares of capital stock thus authorized, only 71,966 shares with a total par value of $7,196,600 have been issued and are now outstanding.

V

The 665 shares, or 66.5 per cent of the common stock which carries full voting rights, are deposited in a voting trust in accordance with the pre-organization agreement with the New York Telephone Company, and Fred C. Goodwin and his wife own all the voting trust certificates issued on the deposited shares; 335 shares, or 33.5 per cent of the common stock, and 48,140 shares (all) of the second preferred stock are now owned by the New York Telephone Company, and 22,826 shares of the first preferred stock and bonds in the

[fol. 763] amount of $6,238,000 are outstanding and in the hands of the public.

VI

While the common stock is designated as "voting stock", its majority voting power is limited by the certificate of incorporation which provides that action upon all major matters, other than those that may be classified as routine business, and including such matters as increase or reduction of capital stock, the issuance of preferred stock other than that provided in the certificate and the alteration or amendment of the certificate, will not become effective unless concurred in by an affirmative vote of 80 per cent of the outstanding common stock. The 80 per cent vote has been required.

VII

The second cumulative preferred stock, all of which is owned by the New York Telephone Company, has equal voting power with the common stock, except that it cannot vote for directors or the adoption or amendment of by-laws unless and until there is default in the payment of dividends upon such second preferred stock, in which event it shall have full voting power. Such default has never occurred.

VIII

The second preferred stock is non-callable and entitled to priority over common stock to the full extent of its par value upon the distribution of assets of the corporation or in the event of insolvency or dissolution.

IX

The first preferred stock, which is owned by the general public, neither has nor can acquire any voting rights or privileges.

X

Both the common and second preferred stock are limited to 5 per cent dividends but share equally in any extra dividends up to 3 per cent and in case of dissolution or sale share, [fol. 764] equally in the assets remaining after the payment to all stockholders of the full amount of their stock at par value. The second preferred stock, all of which is owned by the New York Telephone Company, is not redeemable, but the first preferred stock may be redeemed at any time on any

dividend payment date at 10 per cent above par plus unpaid accumulated dividends.

XI

The annual dividend requirement on the outstanding stock amount to $389,069, and th petitioner had a surplus of $1,298,490 at December 1, 1935, from which it appears that there is little change of a default for a period of years.

XII

The Rochester Telephone Corporation has outstanding three kinds of stock, two of which have voting privileges. The New York Telephone Company owns more than 67 per cent of the total stock, voting and non-voting, issued and outstanding, which includes 33.5 per cent of the common stock and 100 per cent of the second preferred stock, and 98 per cent of all of the stock which has present or potential voting privileges.

XIII

The pre-organization agreement, under which the consolidation became effective, provided that three persons, Fuller, McCanne and Zoller, were to be employed at a fixed compensation to render services essential to the consolidation of the properties which included using their best efforts to effect the sale and conveyance of all the properties of the old Rochester Telephone Company to the new Rochester Telephone Corporation (petitioner); bringing about the incorporation of the petitioner; securing the approval of the Public Service Commission of New York to schedules of rates as specified in the agreement; purchasing 665 shares of common stock of a total of 1,000 author- [fol. 765] ized shares; and presenting to the New York Telephone Company satisfactory proof of the performance of these services, in return for which the company would pay them $70,000 upon the express stipulation, however, that $66,500 of this amount was to be used by the three above named individuals in the purchase of the 665 shares of common stock which would be placed in the voting trust. The 665 shares of common stock were actually issued as follows: George R. Fuller, trustee, 645 shares; W. Roy McCanne, 10 shares; Fred C. Goodwin, 10 shares. Thus, Zoller, one of the three individuals party to the pre-organi-

zation agreement, does not appear to have received any part of this stock for his part in the transaction. No explanation or reason therefor appears in the record. Pursuant to the pre-organization agreement, the 665 shares of common stock were deposited under a voting trust agreement with Goodwin, Fuller and McCanne as voting trustees. Fuller and McCanne subsequently died and J. Foster Warner and John P. Boylan were appointed voting trustees in their stead, respectively.

XIV

The 665 shares of common stock eventually came into the possession of Goodwin and, although he and his wife are the owners of the voting trust certificates covering all the common stock of the petitioner except that owned by the New York Telephone Company, the stock is still deposited under a trust agreement which expired August 1, 1936 but which he testified would be renewed for another ten year period.

XV

Five of the original nine incorporators were prominent citizens of Rochester but none received any stock. Of the fifteen members of the Board of Directors, ten, including Goodwin, are prominent citizens of Rochester, and no one except him has any voting stock. They serve on the Board of Directors merely as a matter of civic interest.

[fol. 766] XVI

The policies of the petitioner are governed and its ordinary business operations are directed by the Board of Directors and the executive committee consisting of five directors, three of whom are named by the voting trustees and two by the New York Telephone Company. Provision is made in the articles of incorporation for cumulative voting in the election of directors and executive committee members to insure the New York Telephone Company representation roughly proportionate to its holdings of common stock. The voting trustees and at least a majority of the directors must be residents or business men within the territory served by petitioner and in no way affiliated or connected with the American Telephone and Telegraph Company or the New York Telephone Company.

XVII

The Rochester Telephone Corporation acquired all the properties, both real and personal, of both the old companies located in the prescribed territory including exchanges, connecting lines and equipment, except the toll switchboards and through toll lines owned by the New York Telephone Company. The Rochester Telephone Corporation owns and operates switchboards for both local and toll service to all points of operation within its territory except in the City of Rochester where it has no toll board although it has seven otherwise completely equipped switchboard exchanges. All of the petitioner's intraterritorial toll calls, originating or terminating in the City of Rochester, are handled by the New York Telephone Company through its toll switchboard, on a flat rate per message basis. Petitioner, having no lines crossing state boundaries or extending beyond the limits of its territory, uses the facilities of the New York Telephone Company in its extraterritorial and interstate traffic. These facilities are arranged and paid for on a different per message basis.

[fol. 767] XVIII

Petitioner has always done its own financing. Said Fred C. Goodwin conducted all of the negotiations for the sale of the preferred stock issue in 1926. In 1928 he arranged for the sale of $5,000,000 of four and one-half per cent bonds and out of the sale price $3,500,000 of six per cent bonds were retired, leaving about $1,500,000 for extensions and additions to plant. The last financing done by petitioner in 1985 was also handled by said Goodwin. Since its organization in 1921, petitioner has not had any financial assistance from the New York Telephone Company or any of the "Bell" Companies, except a loan of $150,000 for working capital when it was first organized, which was paid back within a few months. The majority of the purchases of supplies and equipment are made from independent manufacturers and local jobbing concerns, the principal telephone equipment being purchased from the Stromberg-Carlson Telephone Manufacturing Company at Rochester. Proposals for new construction, additions to the plant and matters of that nature originate in the Engineering or other proper departments of petitioner, and it has never had any engi-

neering assistance from the New York Telephone Company: it has an Engineering Department of its own. No so-called license fees are paid by petitioner to the New York Telephone Company and no part of the gross revenues of petitioner has ever been paid to the New York Telephone Company except for services actually performed. Every officer of petitioner who was employed by that corporation at the date of its organization in 1921, if alive, is still an officer of petitioner, whereas personnel of the staff of the New York Telephone Company changes frequently. There are a number of important differences between practices followed by petitioner and practices followed by the New York Telephone Company in similar matters, such as the set-up and contents of the Telephone Directory, the observance of holi- [fol. 768] days, the method of payment for coin box collections, scheduled rates for services and other matters. There are fifteen Directors of petitioner. Of this number the New York Telephone Company elects five because of its ownership of 335 shares of the common stock and the provisions for cumulative voting applicable to that stock. Out of that number the entire five were present at only one meeting of the Board of Directors. Three or four times four of the five were present at a Directors' meeting. At over ninety per cent of the Directors' meetings there have been less than three of the New York Telephone Company Directors present. The local Directors outnumber the "Bell" Directors two to one and the average attendance at all the Directors' meetings is about seven Rochester Directors to three or less of the "Bell" Directors.

XIX

By means of stock ownership and as a dominant financial factor in the petitioner's organization taken together with the above contractual arrangements, the New York Telephone Company has power to control the petitioner. The plan providing for the organization and incorporation, election of directors and placing the common stock in a voting trust gave control directly and indirectly to the New York Telephone Company.

XX

The Rochester Telephone Corporation has at all times been engaged in intrastate communication, wholly within the State of New York, and has also been and now is en-

gaged in interstate and foreign communication by wire solely through physical connection with the facilities of the New York Telephone Company.

From the foregoing facts the Court makes the following:

Conclusions of Law

I

The petitioner herein is a wire telephone carrier subject to the Communications Act of 1934. This Court has juris-[fol. 769] diction of the action and of all parties hereto. The petitioner has no adequate remedy at law. It has not been guilty of laches and is entitled to maintain this suit.

II

The Rochester Telephone Corporation, being engaged in interstate and foreign communication, is subject to regulation under the Commerce Clause of the Federal Constitution.

III

Section 2(a) of the Communications Act of 1934 makes all carriers engaged in interstate and foreign communication by wire or radio subject to the provisions of the Act, but Section 2(b)(2) exempts petitioner from the Commission's jurisdiction (except as to Sections 201-205, inclusive) if it is engaged in interstate and foreign communication solely through physical connection with the facilities of another carrier which is not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such other carrier. Petitioner, being engaged in interstate and foreign communication through physical connection with the facilities of the New York Telephone Company, is subject to all provisions of the Communications Act of 1934 applicable to wire te ephone carriers if it does not fall within the exceptions contained in Section 2(b)(2).

IV

The burden is upon the petitioner to bring itself within the exceptions contained in Section 2(b)(2) of the Communications Act of 1934.

V

Congress intended "control" as used in the statute to be broadly construed, and has recognized the fact that there are many ways in which actual control may be accomplished, such as stock ownership, leasing, contract and agency agree- [fol. 770] ments. Control may be exercised through ownership of a small percentage of the voting stock of a corporation, either by ownership of such stock alone or through such ownership in combination with other factors. Broadly used, "control" may embrace every form of control, actual or legal, direct or indirect, negative or affirmative.

VI

By means of stock ownership, election of directors, the placing of common stock in a voting trust, and as a dominant financial factor in the petitioner's organization taken together with contractual arrangements heretofore described, the New York Telephone Company has the power to control directly and indirectly the petitioner Rochester Telephone Corporation within the meaning of Section 2(b)(2) of the Communications Act of 1934.

VII

Petitioner is not deprived of its property without due process of law in violation of the Federal Constitution by the provisions of the Order of the Commission, Telephone Division, Docket No. 3293, dated November 18, 1936, classifying it as a common carrier subject to all provisions of the Communications Act of 1934 and all General Orders of the Commission applicable to wire telephone carriers.

VIII

The Federal Communications Commission, in making and issuing the Orders complained of and as applied to the petitioner, did not act in an unreasonable or arbitrary manner or exceed the power and authority delegated to it by the Communications Act of 1934.

IX

The petitioner is not entitled to a decree vacating, setting aside and annulling the Orders of the Federal Communications Commission under consideration herein and is not

[fol. 771] entitled to any equitable relief. Its application for a permanent injunction and other relief should be denied in all respects.

Dated this 18th day of October, 1938.

Martin T. Manton, Circuit Judge. John Knight, District Judge. Harold P. Burke, District Judge.

[fol. 772] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

In Equity. No. 2141

ROCHESTER TELEPHONE CORPORATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents

DECREE—Filed October 21, 1938

This cause came on regularly to be heard before the underscribed Martin T. Manton, Circuit Judge, Harold P. Burke and John Knight, District Judges, sitting as a statutory three-judge court on the 18th of May, 1938, at the City of Rochester, New York; pursuant to an order of such court upon the application of the petitioner for a permanent injunction suspending and annulling the operation of an order issued by the Federal Communications Commission, through its Telephone Division, Docket No. 3293, dated November 18, 1936, classifying the petitioner as a common carrier subject to the provisions of the Communications Act of 1934 and also subject to all general orders of the telephone division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000; and the cause having been fully argued by counsel; and the parties having stipulated in open court to submit said cause for final determination upon the pleadings, the record and exhibits before the Federal Communications Commission, and briefs on file; and the record before the Commission, the briefs and pleadings of the parties having been filed as directed; and this Court having been fully advised in the premises, and

an opinion in writing having been delivered by Judges Manton, Burke and Knight, and this Court having made and [fol. 773] filed herein its Findings of Fact and Conclusions of Law.

Now, therefore, it is ordered, adjudged and decreed that the bill of complaint filed by the petitioner be dismissed and that the petitioner be directed to comply with the provisions of the order of the Federal Communications Commission of November 18, 1936 classifying the petitioner as a common carrier subject to the provisions of the Communications Act of 1934.

Dated this 18th day of October, 1938.

(Signed) Martin T. Manton, Circuit Judge. Harold P. Burke, John Knight, District Judges.

[fol. 774] [File endorsement omitted.]

[fol. 775] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed November 9, 1938

To the Honorable John J. Bennett, Jr., Attorney General of the State of New York:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are hereby notified that Rochester Telephone Corporation, the above named petitioner, has taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court, entered herein October 21, 1938, denying the prayer of said petitioner that a certain Order of the Federal Communications Commission, dated November 18, 1936, classifying the Rochester Telephone Corporation as a wire telephone carrier subject to all the common carrier provisions of the Communications Act of 1934 and, therefore, subject to all Orders of the Telephone Division applicable to wire telephone carriers whose annual gross income exceeds $50,000, be enjoined, set aside and annulled; and that the Order [fol. 776] allowing said appeal makes the same returnable

in the Supreme Court of the United States thirty days from the date hereof.

Dated at Rochester, New York, this 2nd day of November, 1938.

(Sgd.) T. Carl Nixon, E. Willoughby Middleton, Justin J. Doyle, Solicitors for Rochester Telephone Corporation, Petitioner-Appellant, Office and Post Office Address, 31 Exchange Street, Rochester, New York.

[fol. 777] [File endorsement omitted.]

[fol. 778] [Title omitted]

Service of a notice of the taking of an appeal in the above entitled suit from the decree of the District Court of the United States, for the Western District of New York, to the Supreme Court of the United States, is hereby admitted this 9th day of November, 1938.

John J. Bennett, Jr., Attorney General of the State of New York.

[fol. 779] In United States District Court

[Title omitted]

Petition for Appeal—Filed November 9, 1938

To the Honorable Martin T. Manton, Circuit Judge for the Second Circuit; Harold P. Burke, District Judge of said District; John Knight, District Judge of said District:

Comes now the plaintiff-petitioner and hereby appeals to the Supreme Court of the United States from the final decree herein dated October 18, 1938 and entered herein on October 21, 1938, because of errors prejudicial to petitioner which are set forth in the assignment of errors presented and filed herewith. There is also presented and filed herewith a statement of the basis of the jurisdiction of the Supreme Court of the United States to review said decree upon appeal.

Your petitioner respectively prays that said appeal be allowed for the correction of errors so complained of, and for the reversal of the decree, that the amount of bond be

fixed, that citation be issued as provided by law, and that the original record, duly authenticated, be transmitted to [fol. 780] the Supreme Court of the United States, in accordance with the rules of said Court.

Dated, Rochester, New York, November 1st, 1938.

(Sgd.) T. Carl Nixon, E. Willoughby Middleton, Justin J. Doyle, Solicitors for Plaintiff-Petitioner.

[fol. 781] [File endorsement omitted.]

[fol. 782] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 9, 1938

Comes now the plaintiff-petitioner and assigns as errors upon which it will rely upon its appeal to the Supreme Court of the United States from the final decree of this Court entered herein October 21, 1938, which final decree denied petitioner's application for a permanent injunction setting aside and annulling an Order issued by the Federal Communications Commission through its Telephone Division, Docket No. 3293, dated November 18, 1936, classifying the petitioner as a common carrier subject to the provisions of the Communications Act of 1934 and also subject to all general orders of the Telephone Division applicable to wire telephone carriers whose gross annual income exceeds $50,000, certain of which general orders are more specifically referred to in petitioner's petition or bill of complaint herein, the following:

The District Court erred:

1. In finding (XII) that New York Telephone Company [fol. 783] owns 98 percent of all of the stock of Rochester Telephone Corporation which has present or potential voting privileges.

2. In finding (XIX) that New York Telephone Company has power to control Rochester Telephone Corporation and that the plan providing for Rochester Telephone Corporation's organization and incorporation, election of directors and the placing of its common stock in a voting trust gave

control directly and indirectly the New York Telephone Company.

3. In concluding (I) that petitioner is a wire telephone carrier subject to the Communications Act of 1934, except insofar as Sections 201 to 205 of said Act, both inclusive, shall, except as otherwise provided therein, apply to the petitioner.

4. In concluding (II) that petitioner is subject to regulation under the Commerce Clause of the Federal Constitution, except insofar as Sections 201 to 205 of the Federal Communications Act, both inclusive, shall, except as otherwise provided therein, apply to the petitioner.

5. In concluding (IV) that the burden is upon the petitioner to bring itself within the exceptions contained in Section 2 (b) (2) of the Communications Act of 1934.

6. In concluding (V) that Congress intended "control," as used in the Federal Communications Act, to be so broadly [fol. 784] construed as to embrace every form of control, actual or legal, direct or indirect, negative or affirmative.

7. In concluding (VI) that by means of stock ownership, election of directors, the placing of common stock in a voting trust, and as a dominant financial feature of Rochester Telephone Corporation's organization, taken together with certain contractual arrangements with New York Telephone Company, that the New York Telephone Company has the power to control directly and indirectly, the Rochester Telephone Corporation within the meaning of Section 2 (b) (2) of the Communications Act of 1934.

8. In concluding (VII) that petitioner is not deprived of its property without due process of law, in violation of the Federal Constitution, by the provisions of the Order of the Federal Communications Commission, Telephone Division, Docket No. 3293, dated November 18, 1936, classifying it as a common carrier subject to all provisions of the Communications Act of 1934 and all General Orders of the Commission applicable to wire telephone carriers.

9. In concluding (VIII) that the Federal Communications Commission, in making and issuing the Orders complained of and as applied to the petitioner, did not act in an unreason-

able or arbitrary manner or exceed the power and authority delegated to it by the Communications Act of 1934.

[fol. 785] 10. In concluding (IX) that the petitioner is not entitled to a decree vacating, setting aside and annulling the orders of the Federal Communications Commission described in its petition herein and is not entitled to the equitable relief prayed for in its petition or bill of complaint.

11. In concluding (IX) that petitioner's application for a permanent injunction and other relief should be denied in all respects.

Wherefore, petitioner prays that said decree of this Court, entered herein on October 21, 1938, be reversed and that the United States District Court for the Western District of New York be ordered to enter a decree in accordance with the prayer of the petition or bill of complaint, or in such other form as the Supreme Court of the United States may deem just.

Dated at the City of Rochester, in the State of New York, the 1st day of November, 1938.

(Sgd.) T. Carl Nixon, E. Willoughby Middleton, Justin J. Doyle, Solicitors for Plaintiff-Petitioner.

[fol. 786] [File endorsement omitted.]

[fol. 787] In United States District Court for the Western District of New York

In Equity. No. 2141

Rochester Telephone Corporation, Petitioner,

v.

The United States of America and Federal Communications Commission, Respondents

Order Allowing Appeal—Filed November 9, 1938

Upon the petition of plaintiff-petitioner for the allowance of an appeal to the Supreme Court of the United States from the decree dated October 18, 1938 and entered herein on October 21, 1938, assignment of errors and statement of the basis of the jurisdiction of the Supreme Court presented and filed therewith, it is hereby

Ordered, that said appeal be and the same hereby is allowed, as prayed.

Further Ordered, that the bond on appeal, to be approved by the Court, is fixed at the sum of $250.00

Further Ordered, that the original record, duly authenticated, be transmitted forthwith to the Supreme Court.

Dated, November 2nd, 1938.

(Sgd.) Harold P. Burke, District Judge.

[fols. 788-799] [File endorsement omitted.]

[fol. 800] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 801] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed November 26, 1938

Comes now the above named Appellant pursuant to Paragraph 9 of Rule 13 of the Rules of this Court and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point I. Appellant is a carrier engaged in interstate or foreign communication solely through physical connection with the facilities of New York Telephone Company, which does not control, or have the power to control, Appellant, directly or indirectly.

Point II. The plan providing for Appellant's organization and incorporation, the ownership of certain stock of the Appellant by New York Telephone Company, the election of Appellant's directors, the placing of certain of Appellant's common stock in a voting trust, and certain contractual arrangements between Appellant and New York [fol. 802] Telephone Company did not, and do not, give New York Telephone Company control, or the power to control, Appellant, directly or indirectly, within the meaning of Section 2 (b) (2) of the Communications Act of 1934.

Point III. The Appellant is entitled to be exempted under Section 2 (b) (2) of the Communications Act of 1934,

from the provisions of said Act, except insofar as Sections 201-205 of said Act may apply to it.

Point IV. The Order issued by the Federal Communications Commission through its Telephone Division, Docket No. 3293, dated November 18, 1936, classifying Appellant, as a wire telephone carrier, as subject to all common carrier provisions of the Communications Act of 1934 and, therefore, subject to all Orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000, is invalid, and the Commission, in erroneously issuing the same, acted in an unreasonable and arbitrary manner and exceeded the power and authority delegated to it by the Communications Act of 1934.

Point V. The specially constituted District Court below should have made a decree vacating, setting aside and annulling said Order, hereinabove described under Point IV, and the General Orders with which said Commission demanded that it comply pursuant to said Order.

The Appellant further believes that the whole of the [fol. 803] record, as filed, is necessary for the consideration of the foregoing points, excepting the following documents and papers therein contained:

1. Telephone Division Order dated October 9, 1935, Docket No. 3293, requiring Rochester Telephone Corporation to file responses to Orders Nos. 1, 2, 3, 5, 6, 6-A and 9.

2. Telephone Division Order dated November 13, 1935, Docket No. 3293, amending said Order dated October 9, 1935.

3. Answer of Rochester Telephone Corporation dated October 31, 1935.

4. Federal Communications Commission Exhibit A (traffic agreement between New York Telephone Company and Rochester Telephone Corporation, effective January 1, 1929).

5. Federal Communications Commission Exhibit B (agreement between New York Telephone Company and Rochester Telephone Corporation dated January 1, 1923).

6. Rochester Telephone Corporation's Exhibit No. 15, Docket No. 3293, (stock record of voting trust certificates, certified December 31, 1935).

7. Rochester Telephone Corporation's Exhibit No. 14, Docket No. 3293, (common stock record, certified December 31, 1935).

8. Rochester Telephone Corporation's Exhibit No. 16, Docket No. 3293, (copy of questionnaire on Commission's form No. 11450).

[fol. 804] 9. Letter addressed to Ward and Paul, official reporters, dated December 7, 1936, written by Hubbell, Taylor, Goodwin, Nixon & Hargrave, and the following exhibits transmitted therewith:

Agreement between Rochester Telephone Corporation and Stromberg-Carlson Telephone Manufacturing Company.

Agreement between Rochester Telephone Corporation and WHEC, Inc.

Copy of minutes of the meeting of the Board of Directors of Rochester Telephone Corporation held March 26, 1926.

Minutes of the meeting of the incorporators, stockholders and directors of Rochester Telephone Corporation held May 7, 1920.

10. Map showing intra-territorial toll system of Rochester Telephone Corporation.

11. Lease between Rochester Telephone Corporation and New York Telephone Company dated July 26, 1935.

12. Report of Chief Examiner, III-IX, Docket No. 3293, submitted June 24, 1936.

13. Exceptions by Rochester Telephone Corporation to report of Chief Examiner, Docket No. 3293, dated July 22, 1936.

14. Transcript of oral argument held September 28, 1936, before the Telephone Division of the Commission, Docket No. 3293.

15. Report of the Federal Communications Commission, Docket No. 3293, dated November 18, 1936.

[fol. 805] 16. Petition of Rochester Telephone Corporation for a rehearing, Docket No. 3293, filed December 28, 1936.

17. Order of the Federal Communications Commission, Docket No. 3293, dated January 17, 1937, denying petition for rehearing.

18. Citation upon appeal.
19. Bond upon appeal.

Dated at the City of Rochester, in the State of New York, the 25th day of November, 1938.

T. Carl Nixon, Justin J. Doyle, Counsel for Appellant.

[fols. 806-807] PROOF OF MAILING

Cecilia I. Dwyer, being duly sworn, deposes and says: That on November 25, 1938, at the City of Rochester, State of New York, I deposited in the United States Post Office, at Rochester, New York, in sealed envelopes, one addressed Robert M. Cooper, Esq., Special Assistant to the Attorney General of the United States, Department of Justice, Washington, D. C., and the other addressed William J. Dempsey, Esq., Acting General Counsel, Federal Communications Commission, Washington, D. C., Attention James A. Kennedy, Esq., Assistant General Counsel, true copies of the Points and Designation in the above entitled cause.

Cecilia I. Dwyer.

Subscribed and sworn to before me this 25th day of November, 1938. Scott Stewart, Jr., Notary Public for the County of Monroe, State of New York. (Seal.)

[fol. 808] [File endorsement omitted.]

[fol. 809] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF RECORD—Filed December 6, 1938

Come now the above-named Appellees pursuant to Rule 13, Paragraph 9, of the Revised Rules of this Court, and state that in addition to the parts of the record designated by Appellant herein, the following parts of the record are necessary for full consideration of the points contained in Appellant's statement of points on which it intends to rely:

1. Federal Communications Commission Exhibit A (traffic agreement between New York Telephone Company and Rochester Telephone Corporation, effective January 1, 1929).

2. Federal Communications Commission Exhibit B (agreement between New York Telephone Company and Rochester Telephone Corporation, dated January 1, 1923).

3. Rochester Telephone Corporation's Exhibit No. 15, Docket No. 3293 (stock record of voting trust certificates, certified December 31, 1935).

4. Rochester Telephone Corporation's Exhibit No. 14, Docket No. 3293 (common stock record, certified December 31, 1935).

5. Rochester Telephone Corporation's Exhibit No. 16, Docket No. 3293 (copy of questionnaire on Commission's form No. 11450).

[fol. 810] 6. Letter addressed to Ward and Paul, official reporters, dated December 7, 1936, written by Hubbell, Taylor, Goodwin, Nixon & Hargrave, and the following exhibits transmitted therewith:

a. Copy of minutes of the meeting of the Board of Directors of Rochester Telephone Corporation held March 26, 1926.

b. Minutes of the meeting of the incorporators, stockholders and directors of Rochester Telephone Corporation held May 7, 1920.

7. Map showing intra-territorial toll system of Rochester Telephone Corporation.

8. Lease between Rochester Telephone Corporation and New York Telephone Company, dated July 26, 1935.

9. Report of the Federal Communications Commission, Docket No. 3293, dated November 18, 1936.

Dated at Washington, D. C., this 5th day of December, 1938.

Golden W. Bell, Assistant Solicitor General. Robert M. Cooper, Special Assistant to the Attorney General of the United States. Federal Communications Commission, William J. Dempsey, Acting General Counsel.

[fol. 811] [File endorsement omitted.]

Endorsed on cover: File No. 42,966. W. New York, D. C. U. S. Term No. 481. Rochester Telephone Corporation, appellant, vs. The United States of America and Federal Communications Commission. Filed November 21, 1938. Term No. 481, O. T., 1938.

(9801)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 481

ROCHESTER TELEPHONE CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION.
Appellees.

JURISDICTIONAL STATEMENT.

Appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents as follows:

I.

Statutory Provisions Believed to Sustain the Jurisdiction.

1. Section 402 (a) of the Communications Act of 1934, U. S. Code, Title 47, Sec. 402 (a), (47 U. S. C. A., Sec. 402 (a)).

2. Urgent Deficiencies Appropriation Act, October 22, 1913, Chap. 32, 38 Stat. 219, 220; U. S. Code, Title 28, Secs. 47 and 47a, (28 U. S. C. A., Secs. 47 and 47a). This

Act provides that an appeal may be taken direct to the Supreme Court of the United States from decrees made by statutory three-judge courts granting or denying injunctions against the operation of orders of the Interstate Commerce Commission.

Said Sec. 402 (a) of said Communications Act makes said sections of said Urgent Deficiencies Act applicable to orders of the Federal Communications Commission.

II.

Order of the Federal Communications Commission, the Validity of Which is Involved.

On November 18, 1936, the Federal Communications Commission, through its Telephone Division, Docket No. 3293, made the following order:

> "Pursuant to the Report of the Commission issued by the Telephone Division herein, it is hereby ordered that the Rochester Telephone Corporation, as a wire telephone carrier, be, and the same is hereby, classified as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000."

In its petition appellant prayed for a permanent injunction setting aside and annulling said order and certain other general orders of said Commission referred to in said petition with which the Commission demanded that it comply pursuant to said order dated November 18, 1936.

III.

Date of Decree and of Application for Appeal.

The final decree of the statutory three-judge court, denying the prayer of appellant's petition, is dated October

18, 1938, was entered herein on October 21, 1938, and the application for this appeal was made November 2, 1938.

IV.

Nature of the Case.

After hearings held before an Examiner of the Federal Communications Commission, at which testimony was offered and exhibits placed in evidence by appellant, the Federal Communications Commission made the order set forth above under the caption "II".

Appellant thereafter brought this suit in the United States District Court for the Western District of New York for a permanent injunction setting aside and annulling said order dated November 18, 1936, and certain general orders requiring it to file various reports (more particularly described in its petition herein) with which it was directed to comply pursuant to said order. The suit was heard at Rochester, New York, on May 18, 1938, before a specially constituted three-judge court (47 U. S. C. A., Sec. 402 (a), 28 U. S. C. A., Sec. 47), which made a final decree denying the prayer of appellant's petition.

Appellant, on the hearing of this suit contended (as it had likewise contended throughout the hearings before the Commission), that it is engaged in intrastate communication wholly within the State of New York, and is also engaged in interstate and foreign communication by wire solely through physical connection with the facilities of the New York Telephone Company and that, therefore, it is a "connecting carrier" within the definition contained in Sec. 3 (u) of the Communications Act of 1934 (47 U. S. C. A., Sec. 153), and that it is exempted under Sec. 2 (b) (2) of said Act (47 U. S. C. A., Sec. 152 (b)) from the provisions of said Act, except in so far as Secs.

201-205 of said Act (47 U. S. C. A., Secs. 201-205) may apply to it.

Said Section 2 (b) (2) provides as follows:

> "Subject to the provisions of section 301, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to. * * * (2) Any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier; except that sections 201 to 205 of this chapter, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2)."

(The provisions of Section 301 do not apply to a telephone carrier.)

Both the Commission and the statutory three-judge court denied appellant's contention on the ground that New York Telephone Company controls, or has the power to control, appellant, directly and indirectly, and that, therefore, it is not entitled to exemption from said Act under Section 2 (b) (2) thereof.

Appellant contends that there was no evidence on which said Commission or said statutory three-judge court could or should have based a finding or conclusion that New York Telephone Company controls, or has the power to control, appellant, directly or indirectly, and that its rights were substantially prejudiced by a denial to it of the exemption which Congress, in enacting said Act, intended that it should receive.

V.

Cases Sustaining Jurisdiction.

American Telephone & Telegraph Co. et al. v. *U. S.* (D. C. N. Y., 1936), 299 U. S. 232, 57 S. Ct. 170, 81 L. Ed. 142, affirming 14 Fed. Supp. 121.

APPENDIX.

Copy of Opinion Delivered upon the Rendering of the Decree Sought to be Reviewed.

Such opinion is attached to this statement as an appendix thereto. It is reported in 23 Fed. Supp. 634.

Respectfully submitted,

(Sgd.) T. CARL NIXON,
(Sgd.) E. WILLOUGHBY MIDDLETON,
(Sgd.) JUSTIN J. DOYLE,
Solicitors for Appellant.

EXHIBIT "A".

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

ROCHESTER TELEPHONE CORPORATION, *Petitioner,*
against
THE UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

Before Martin T. Manton, Circuit Judge, and John Knight and Harold P. Burke, District Judges, Constituting a Statutory Court Convened Pursuant to the Provisions of § 402(a) of the Communications Act (48 Stat. 1093; 47 U. S. C. A., § 402(a)).

Suit in equity to set aside an order of the Federal Communications Commission, classifying the petitioner as a wire telephone carrier subject to its jurisdiction and directing that it file certain reports. Decree for respondents.

T. Carl Nixon, Attorney for Petitioner; Justin J. Doyle, of Counsel.

Hampson Gary, General Counsel for Federal Communications Comm.; James A. Kennedy, Asst. General Counsel; Elizabeth C. Smith, Asst. Counsel.

Robert M. Cooper, Special Assistant to the Attorney General; Thurman Arnold, Asst. Atty. General; Wendell Berge, John J. Abt, Special Assistants to the Attorney General.

MANTON, *Circuit Judge:*

This suit is brought to set aside an order of the Federal Communications Commission which directs petitioner to comply with certain orders of the Commission. 47 U. S. C. A. § 402(a). The United States is made a party (§ 211 of the Judicial Code; 28 U. S. C. A. § 48). The petitioner maintains that it is not subject to such supervision because of § 2(b) (2) of the Communications Act of 1934 (48 Stat. 1093; 47 U. S. C. A. § 402(a)) which provides:

> "Subject to the provisions of § 301, nothing in this chapter shall be construed to apply or to give the Com-

> mission jurisdiction with respect to * * * (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; except that sections 201 to 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2)."

By § 402(a) "the provisions of the Act of October 22, 1913 (38 Stat. 219) relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission" are applicable to suits to enforce or set aside any order of the Commission under the Communications Act.

Between July 20, 1934 and September 13, 1934, the Communications Commission promulgated general orders Nos. 1, 2, 3, 5, 6, 6a and 9 which required telephone carriers subject to its jurisdiction to report information regarding their operations and corporate structure to the Commission. Petitioner failed to comply with these orders and ultimately, after notice and a hearing, was classified by the Commission as a wire telephone carrier subject to all common carrier provisions of the Communications Act and therefore subject to all general orders of the Commission applicable to such carriers.

The questions presented are: (1) what type of influence and control Congress intended to include by the phrase "directly and indirectly * * * controlled by" as used in § 2(b)(2) of the Act; and (2) whether the petitioner is directly or indirectly controlled by the New York Telephone Company within the same section. Section 2(a) makes all carriers engaged in interstate or foreign commerce by wire or radio, subject to the provisions of the act. But § 2(b)(2) exempts petitioner from the Commission's jurisdiction if it is engaged in interstate and foreign communications solely through physical connection with the facilities of another carrier and is not directly or indirectly controlled by such other carrier. Petitioner is concededly engaged in interstate and foreign communications solely by wire through its physical connections with the facilities of the New York

Telephone Company, and the latter is a carrier subject to the jurisdiction of the Communications Commission.

It is essential to find what meaning Congress intended by the use of the word "control" in the statute. The report of the Committees of Congress may be consulted to find the Congressional intent. Woodward *v.* Graffenreid, 238 U. S. 284; Lapina *v.* Williams, 232 U. S. 78. From these reports it is clearly indicated that Congress intended "control" as used in the statute to be broadly construed. In House Report 1850, 73 Cong., Second Session, pp. 4, 5, it is stated:

> "No attempt is made to define 'control', since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control."

Congress has recognized the fact that there are many ways in which actual control may be exerted, such as stock ownership, leasing, contract and agency. Congress also realized that control may be exercised "through ownership of a small percentage of the voting stock of the corporation, either by the ownership of such stock alone or through such ownership in combination with other factors."

Broadly used, "control" may embrace every form of control, actual or legal, direct or indirect, negative or affirmative. And in Natl. Gas Co. *v.* Slattery 302 U. S. 300) the court said (pp. 307-308):

> "We have not said, nor do we perceive any ground for saying, that the Constitution requires such an inquiry to be limited to those cases where common control of two corporations is secured through ownership of a majority of their voting stock. We are not unaware that, * * * there are other methods of control of a corporation than through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry."

Since provisos and exceptions in statutes are intended to restrain or except that which otherwise would be within the scope of the general language, they must be strictly construed and limited to objects fairly within their terms. The petitioner must bring itself within this exception. Schlemmer *v.* Buffalo, Rochester & Pitts. RR., 205 U. S. 1; Ross *v.* Duval, 13 Peters, 44.

Usually the management of corporate affairs is vested in the stockholders and where a majority of the voting stock is owned by another corporation, the control of the first company resides there. It may not be disputed that a minority stockholder can exercise strong influence and even control over the affairs of a corporation. See: U. S. *v.* Union Pac. Ry. Co., 226 U. S. 61.

The petitioner was incorporated February 14, 1920 for the purpose of acquiring and consolidating the properties of the New York Telephone Company in the Rochester territory and the Rochester Telephone Company. The petitioner took over the properties of both at an appraised valuation, approved by the New York Public Service Commission, in accordance with the provision of a reorganization agreement. The Rochester Telephone Company's valuation was fixed at $1,600,000 subject to a bonded indebtedness of $1,058,000 which amount was paid with bonds issued by the petitioner for that purpose; these bonds have been retired. The properties of the New York Telephone Company in the Rochester territory were valued at $4,814,000 and were paid for by petitioner with its present second preferred stock. The petitioner was authorized to capitalize its investment at $7,000,000 and to issue 70,000 shares of stock at a par value of $100 per share consisting of 1,000 shares of common (full voting) stock and 69,000 shares of 5% cumulative preferred stock. It began its operations August 1, 1921. In March 1926, it was authorized to increase its capitalization to $12,000,000. and to issue 50,000 shares of 6 to 6½% cumulative preferred stock with a par value of $100. This was classified as first preferred stock and the original preferred stock was reclassified as second preferred stock. Of the 120,000 shares of capital stock thus authorized, only 71,966 shares with a total par value of $7,196,000 have been issued and are now outstanding. 665 shares or 66.5% of

the common stock which carries full voting rights is deposited in a voting trust in accordance with the preorganization agreement with the New York Telephone Company and Fred C. Goodwin owns all the voting trust certificates issued on the deposited shares; 335 shares or 33.5% of the common stock and 48,140 shares (all) of the second preferred stock are now owned by the New York Telephone Company, and 22,826 shares of the first preferred stock and bonds in the amount of $6,238,000 are outstanding and in the hands of the public. Thus 67% of all issued and outstanding capital stock of the petitioner is owned by the New York Telephone Company. While the common stock is designated as "voting stock", its majority voting power is limited by the certificate of incorporation providing that in all major matters other than those that may be classified as routine business and including such matters as increase or reduction of capital stock, the issuance of preferred stock other than that provided in the certificate and the alteration or amendment of the certificate will not become effective unless concurred in by an affirmative vote of 80% of the outstanding common stock. It is provided that the second preferred stock shall have "equal voting power" with the common stock but cannot vote for the election of directors or the adoption or amendment of by-laws, unless or until there is a default in the payment of dividends on the second preferred, in which event it shall have full voting power. The publicly owned first preferred stock neither has nor can acquire any voting rights or privileges. The second preferred stock is entitled to priority over common stock to the full extent of its par value upon the distribution of assets of the corporation or in the event of insolvency or dissolution. Both the common and second preferred stock are limited to 5% dividends but share equally in any extra dividends up to 3% and in case of dissolution or sale share equally in the assets remaining after the payment to all stockholders of the full amount of their stock at par value. The second preferred stock is not redeemable but the first preferred stock may be redeemed at any time on any dividend payment date at 10% above par plus unpaid accumulated dividends.

The annual dividend requirement on the outstanding stock amounts to $389,069 and the petitioner has a surplus of approximately $1,298,490 from which it appears that there is little chance of a default for a period of years. It is further argued that it is not likely there will be any occasion requiring the 80% vote or consent of all common stockholders for the reason that approximately $6,000,000 of the authorized preferred stock and bonds have not been issued and these may be issued by the petitioner at any time without further authority or consent of the New York Telephone Company. But it is admitted that occasion has arisen in the past requiring an 80% vote. It is argued that even though one-third of the common stock and all of the second preferred stock is held by the New York Telephone Company, it is not vested with power to control because none of the voting trustees who control two-thirds of the common stock nor the New York Telephone Company can at any time exercise a 80% vote of the common stock without the aid or consent of the other. From this it is argued that such power and control as the New York Telephone Company may possess is negative or a veto power which is equally possessed by both parties and enables either to block the other on any major proposal which might rise and consequently the New York Telephone Company has no such control over the petitioner as is contemplated within § 2 (b) (2) of the Communications Act. Such argument, however, does not advance the petitioner.

The pre-incorporation agreement, under which the consolidation became effective, provided that three persons, Fuller, McCanne and Zoller, were to be employed at a fixed compensation to render services essential to the consolidation of the properties which included using their best efforts to effect the sale and conveyance of all the properties of the old Rochester Telephone Company to the new Rochester Telephone Corporation (petitioner); bringing about the incorporation of the petitioner; securing the approval of the Public Service Commission of New York to schedules of rates as specified in the agreement; purchasing 665 shares of common stock of a total of 1,000 authorized shares; and presenting to the New York Telephone Company satisfactory proof of the performance of these services in re-

turn for which the company would pay $70,000 upon the express stipulation, however, that $66,500 of this amount was to be used by the three above named individuals in the purchase of the 665 shares of common stock. These 665 shares of common stock eventually came into the possession and control of Goodwin and although he is the owner of the voting trust certificates covering all the common stock of the petitioner except that owned by the New York Telephone Company, the stock is still deposited under a trust agreement which expired August 1, 1936 but which it is said will be renewed for another ten year period. It was the New York Telephone Company which imposed the condition of a voting trust agreement in the preorganization agreement.

Five of the original nine incorporators were prominent citizens of Rochester but none received any stock. Of the fifteen members of the Board of Directors, ten including Goodwin, are prominent citizens of Rochester and no one except he has any voting stock, and they serve on the Board of Directors merely as a matter of civic interest.

The policies of the petitioner are governed by the board of directors and the executive committee consisting of five directors, three of whom are named by the voting trustees and two by the New York Telephone Company. Provision is made in the articles of incorporation for cumulative voting in the election of directors and executive committee members to insure the New York Telephone Company representation roughly proportionate to its holdings of common.

The petitioner acquired all the properties, both real and personal, of both the old companies located in the prescribed territory including exchanges, connecting lines and equipment, except the toll switchboards and through toll lines owned by the New York Telephone Company. It owns and operates switchboards for both local and toll service to all points of operation within its territory except in the City of Rochester where it has no toll board although it has seven otherwise completely equipped switchboard exchanges. Petitioner having no lines crossing state boundaries, uses the facilities of the New York Telephone Company in its extraterritorial and interstate traffic. These

facilities are arranged and paid for on a per message basis.

The Commission could find, as it did, that through stock ownership and as a dominant financial factor in the petitioner's organization taken together with the above contractural arrangements, the New York Telephone Company has power to control the petitioner. The plan providing for the organization and incorporation, election of directors and placing the common stock in a voting trust gave control directly and indirectly to the New York Telephone Company.

We are obliged to accord proper weight to the findings of the Commission which conducted hearings and heard argument on the questions involved. St. Joseph Stock Yards Co. *v.* United States, 298 U. S. 38; Mfgrs. Ry. Co. *v.* United States, 246 U. S. 457. The determination of the Commission under the proof here is binding upon us. Interstate Commerce Comm. *v.* Ill. Central Ry. Co., 215 U. S. 452; Interstate Commerce Comm. *v.* Union Pac. Ry., 222 U. S. 541; Florida *v.* United States, 292 U. S. 1. The petitioner does not come within the exception of the statute as set forth in § 2(b)(2) and since counsel have stipulated that a final decree may be entered upon our determination, judgment will be entered for the respondents.

Dated June 20th, 1938.

MARTIN T. MANTON,
Circuit Judge.

JOHN KNIGHT,
District Judge.

HAROLD P. BURKE,
District Judge.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 481

ROCHESTER TELEPHONE CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Appellees.

APPELLANT'S BRIEF

T. CARL NIXON,
Counsel for Appellant.

JUSTIN J. DOYLE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 481

ROCHESTER TELEPHONE CORPORATION;
Appellant,

v.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Appellees.

APPELLANT'S BRIEF

OPINION BELOW

The District Court of three Judges for the Western District of New York delivered an opinion which is reported in 23 Fed. Supp. 634 (R. 431).

JURISDICTION

This is an appeal from a final decree of the United States District Court for the Western District of New York, entered October 21, 1938, denying appellant's petition for an injunction against the operation of an Order of the Federal Communications Commission dated November 18, 1936 (R. 430).

Section 402 (a) of the Communications Act of 1934

(47 U. S. C. A., Sec. 402 (a)) makes the provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the setting aside of orders of the Interstate Commerce Commission, applicable to suits to enjoin orders of the Federal Communications Commission. Accordingly, the appeal from said decree of the specially constituted District Court below lies directly to this Court (48 Stat. at L. 1064, 1093, Chap. 652, Sec. 402 (a), 47 U. S. C. A. Sec. 402 (a); 38 Stat. at L. 219, 220, Chap. 32, 28 U. S. C. A., Secs. 47, 47 (a)). *American Telephone & Telegraph Co., et al. v. U. S.*, 299 U. S. 232, affirming 14 Fed. Supp. 121.

QUESTIONS, STATUTE AND ORDER INVOLVED

This case presents the questions of the effect of a determination by the Federal Communications Commission for the purposes of the Federal Communications Act of 1934, that the appellant is subject generally to the provisions of said Act, and of the scope of judicial review of that determination.

The Act involved is the Federal Communications Act of 1934 (Act of June 19, 1934, Chap. 652, 48 Stat. at L. 1064, Chap. 652, 47 U. S. C. A., Sec. 151). Particularly there is involved Section 2 (b) (2) of said Act which provides as follows:

> "Subject to the provisions of section 301; nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to. . . . (2) Any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling

> or controlled by, or under direct or indirect common control with, such carrier; except that sections 201 to 205 of this chapter, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2)."

(The provisions of section 301 do not apply to a telephone carrier. Appellant concedes that said sections 201 to 205 are applicable to it.)

The Order involved was made by the Commission on November 18, 1936 and reads as follows:

> "Pursuant to the Report of the Commission issued by the Telephone Division herein, it is hereby ordered that the Rochester Telephone Corporation, as a wire telephone carrier, be, and the same is hereby, classified as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000" (R. 430).

(This Order constitutes a final determination by the Commission that appellant is generally subject to its jurisdiction and directs it to comply with certain orders of its Telephone Division which had theretofore been served upon appellant, to wit, Orders numbers 1, 2, 3, 5, 6A and 9 (R. 20–30)).

STATEMENT

Procedure before Commission: On October 9, 1935, the Commission issued an Order, and on November 13, 1935, issued an amendment thereto requiring appellant

to show cause on a certain day why it should not be required to file responses to its general Orders numbers 1, 2, 3, 5, 6, 6A and 9 (R. 20–30). Appellant filed its verified answer to said Order alleging, among other things, that it is a corporation existing under and by virtue of the Laws of the State of New York; that it is engaged in interstate or foreign communication solely through physical connection with the facilities of the New York Telephone Company; that said New York Telephone Company is not directly or indirectly controlling or controlled by or under direct or indirect common control with appellant; that appellant failed and refused to file responses to Orders numbers 1, 2, 3, 5, 6A and 9, because such Orders are not applicable to or binding upon it, and that it had filed its responses to Order number 6; that it had made formal application to the Commission for an order or decision that it is not subject to its jurisdiction nor bound to comply with the common carrier provisions of the Communications Act, except in so far as Sections 201–205 thereof apply, which application was then pending and undetermined; and had requested a final order or decision determining that appellant is a "connecting carrier" within the definition contained in Section 3 (u) of the Communications Act of 1934 (47 U. S. C. A., Sec. 153 (u)), and that it is exempted under Section 2 (b) (2) of said Act (47 U. S. C. A., Sec. 152 (b)) from the provisions of said Act, except in so far as Sections 201–205 thereof (47 U. S. C. A., Secs. 201-205) may apply to it (R. 412).

Hearings were held before an Examiner of the Commission. At the outset appellant entered a special appearance, denied the Commission's jurisdiction and claimed

exemption as aforesaid (R. 31). Testimony was offered by appellant and a number of exhibits were offered in evidence (R. 34–410B). The Examiner submitted his Report on June 24, 1936, recommending that appellant be held subject to the jurisdiction of the Commission. Appellant duly filed exceptions to the Report of the Examiner, filed a brief and made an oral argument before the Telephone Division of the Commission on the question whether said Report should be adopted, set aside or modified. On November 18, 1936 the Telephone Division of the Commission submitted a Report and made the Order which is the subject of this suit (quoted on page 3, *supra*).

On December 28, 1936, appellant filed a petition for a re-hearing before the Commission *en banc*, and on January 27, 1937, the Commission made an order denying such a hearing to appellant.

Thereafter and on March 23, 1937, this suit was commenced. At the hearing in the District Court, appellant introduced all of the evidence which was before the Commission.

Facts: Appellant was organized in February, 1920, and began business on August 1, 1921 (R. 35, 417). It now operates telephone exchanges in the City of Rochester and in the Counties of Monroe, Livingston, Wayne, Ontario, Wyoming, Steuben and Orleans, all within the State of New York. The territory served covers an area of approximately 1,986 square miles and includes a population of about one-half million people (R. 424). It neither owns nor operates any properties outside the State of New York. Appellant's lines are physically connected in the State of New York with the lines of New York

Telephone Company enabling it to accept messages from and send messages to points beyond the territorial limits of the State of New York. It is in this respect only that appellant is engaged in interstate communication (R. 1, 424, 425, 445).

Prior to February, 1920, there had been two telephone companies operating in Rochester, New York, and vicinity. One was the New York Telephone Company (Bell) and the other was the Rochester Telephone Company (independent). The new corporation (appellant) took over the properties of both companies and consolidated them into a single telephone system (R. 35–59, 417, 440).

The Rochester Telephone Company was organized in 1899. It was one of a large number of independent telephone operating companies which sprang into being after the expiration of the patent rights owned by the Bell companies. In western New York both the Bell and independent companies operated in the Cities of Buffalo, Rochester and Jamestown. Some of the independent companies were successful for awhile but gradually got into difficulties, principally because of the lack of knowledge concerning depreciation charges and the creation of reserves to care for this item (R. 37). The Bell companies began buying in the independents, and complaint, as in violation of the Sherman Anti-trust Act, was made to the Attorney General of the United States (R. 37). To avoid difficulties which might arise, N. C. Kingsbury, Vice-President of the American Telephone & Telegraph Company, held conferences with the Attorney General, resulting in a letter dated December 19, 1913, written by Kingsbury to the Attorney General, which is commonly called

the "Kingsbury Commitment." This agreement provided, among other things, that:

> "Neither the American Telephone & Telegraph Company nor any other company in the Bell System will hereafter acquire, directly or indirectly, through purchase of its physical property or of its securities, or otherwise exercise dominion or control over any other telephone company owning, controlling or operating any exchange or line which is or may be operated in competition with any exchange or line included in the Bell System or which constitutes or may constitute a line or portion of any system so operated or which may be so operated in competition with any exchange or line included in the Bell System" (R. 296).

To remedy the situation in Buffalo, Jamestown and Rochester it was agreed between the parties that the independent company in Buffalo sell its properties to the Bell Company, and that the Bell Company and the independents in Rochester and Jamestown sell their properties in their respective territories to new companies to be created, managed and controlled by local men (R. 39, 50).

New York Telephone Company, by reason of the Kingsbury Commitment (R. 36, 37), was not in a position to acquire any additional independent telephone companies except with the permission of the Department of Justice. At the time of the organization of appellant the practice of the Department of Justice was to refuse to approve the acquisition by a "Bell" company of an "independent" company unless, as part of the same transaction, the Bell company gave up substantially as many stations as it was acquiring (R. 40). The proposed consolidation of the two telephone systems at Rochester, New York, was sub-

mitted to the Department of Justice along with a proposal for the consolidation of systems at Jamestown, New York, and Buffalo, New York, in each of which cities telephone systems were being operated both by the "Bell" and an "independent" company (R. 39). The result sought to be accomplished by the three consolidations was to create new "independent" companies at Rochester and Jamestown to operate the consolidated properties in those cities and to permit New York Telephone Company to take over the "independent" property at Buffalo, New York. The three proposed consolidations provided for the acquisition by the "Bell" company of some 32,000 stations at Buffalo and the loss of some 35,000 stations to the "independents" at Rochester and Jamestown. These proposals were submitted to the Department of Justice (R. 47). The agreements by which the consolidations of the several properties were to be effected were also submitted and after consideration of the plans and a study of the documents the Department of Justice stated that in its opinion the proposed readjustments at Buffalo, Rochester and Jamestown would not be contrary to the Kingsbury Commitment (R. 54). Accordingly, the three consolidations were carried out—that at Rochester being in strict accordance with the consolidation agreement submitted to the Department of Justice (R. 59).

By its certificate of incorporation dated February 14, 1920, appellant was authorized to issue 70,000 shares of capital stock of the par value of $100 per share, of which 1,000 were common and 69,000 preferred (R. 351). The preferred stock was entitled to priority over the common stock to the full extent of its par value upon distribution of the assets of appellant in the event of insolvency or

dissolution; and its pro rata share with the common stock in any surplus assets remaining after the common stock has been repaid to the full extent of its par value. In addition:

". . . The holders of the preferred stock shall have equal voting power with the common stock, except that they shall be without power to vote at any meetings of the stockholders of the corporation held for the purpose of electing directors or for the adoption or amendment of the By-laws of the corporation, unless and until any time after . . . the close of the second fiscal year (as hereinbefore defined) following the first issuance of preferred stock (whether of the whole or only part of the authorized amount of preferred stock) the corporation has failed (in which event it shall forthwith come into full voting power) to pay out of earnings dividends upon all of the issued and outstanding preferred stock at the rates provided to be cumulated as aforesaid, that is to say, three per cent (3%) for the third fiscal year, four per cent (4%) for the fourth fiscal year following the first issuance, as aforesaid, of preferred stock and five per cent (5%) per annum thereafter.

"No vote or consent of the stockholders upon any question of consolidation with any other corporation, or of the lease, sale or conveyance of any of the property rights, privileges or franchises of the corporation, made otherwise than in the ordinary course and conduct of its business, or of the increase or reduction of the capital stock of the corporation, or of the issuance of preferred stock other than in this certificate provided, or of the guaranteeing of bonds of any other corporation, or of the alteration or amendment of this

> certificate . . . . shall be or become effective for any purpose whatsoever unless concurred in by the affirmative vote or consent of at least eighty per cent (80%) of the then issued and outstanding common stock of the corporation.
>
> "Each stockholder entitled . vote at meetings held for the election of directors shall be entitled to as many votes as shall equal the number of his voting shares of stock multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit . . . ." (R. 352-354).

When appellant took over the properties of the New York Telephone Company (Bell) and the Rochester Telephone Company, it paid the New York Telephone Company for its property by issuing 48,140 shares of its preferred stock of a par value of $4,814,000 to the New York Telephone Company. It paid the Rochester Telephone Company for its property in cash, the cash representing part of the proceeds of an issue of bonds secured by a mortgage on appellant's entire property (R. 45, 46, 418).

The preferred stock so issued to the New York Telephone Company has been continuously held by the New York Telephone Company and is so held at the present time (R. 78, 100, 102, 418).

The issued common stock of appellant consists of 1,000 shares of the par value of $100 each (R. 42, 60, 61, 418). 335 (33.5 per cent.) shares of the common stock were originally issued to the New York Telephone Company, or its nominee, and are now held by the New York Telephone Company (R. 61; 418). 665 (66.5 per cent.)

shares of the common stock of appellant were originally issued to Messrs. George R. Fuller, as Trustee, Fred. C. Goodwin and W. Roy McCanne and those 665 shares were immediately deposited with a depositary under a voting trust agreement in which Messrs. Fuller, Goodwin and McCanne were designated as voting trustees and empowered to exercise *all rights* (including the right to vote) with respect to all such stock (R. 367). The original voting trust agreement terminated in 1926 and upon its termination these same 665 shares were again deposited under a similar voting trust agreement which terminated July 31, 1936 (R. 56). By purchase from the estates of Messrs. Fuller and McCanne, Mr. Fred. C. Goodwin became the owner of voting trustees' certificates representing their shares of common stock, so that on November 23, 1934 Mr. Goodwin was the owner of voting trustees' certificates representing the entire 665 shares of such common stock (R. 58, 59). On December 3, 1935, Mr. Goodwin transferred voting trustees' certificates, representing 332 shares of common stock, to his wife, Marion J. Goodwin. At the time of the hearing before the Commission and at the present time the entire 665 (66.5 per cent.) shares of common stock are deposited under a voting trust agreement. The agreement in existence at the time of the hearing terminated July 31, 1936, but Mr. Goodwin testified that he intended to renew it (R. 59) and in fact it has since been renewed for an additional ten-year period. If and when the voting trust terminates, Mr. Fred. C. Goodwin is entitled to have transferred to him 333 shares of the common stock now standing in the name of the voting trustees and Mrs. Fred. C. Goodwin is entitled to have transferred to her 332 of such shares, in accordance with

voting trustees' certificates issued to each of them for such number of shares.

As indicated above, these 665 shares of common stock were originally subjected to a voting trust agreement at the time appellant first began business in 1921. That procedure was followed because it was provided for in the supplemental agreement of February 25, 1918 (R. 332), "in order to assure local management and control of said new corporation" (appellant). In that voting trust agreement it was provided that in voting the stock deposited under the agreement the voting trustees should elect a "board of suitable directors" at least a majority of whom (as is true in respect of the voting trustees and their successors (R. 58, 368)) shall be "residents or business men *within the territory served* by appellant, *and in no way affiliated or connected with the American Telephone and Telegraph Company or the New York Telephone Company*" (R. 368). The original voting trust agreement terminated July 31, 1926, and on August 1, 1926, a new voting trust agreement was executed (R. 56–58). It was in exactly the same form as the original voting trust agreement except that its duration was ten years (expiring July 31, 1936) instead of five. The same voting trustees were named as were named in the original voting trust agreement (R. 57). Mr. Fuller and Mr. McCanne died after the execution of the voting trust agreement existing at the time of the hearing, and Messrs. John P. Boylan and J. Foster Warner, both of Rochester, New York, were designated as their successors (R. 57). Messrs. Goodwin, Boylan and Warner were the voting trustees at the time of the hearing, but Mr. Warner has since died and has been succeeded by Raymond N. Ball, President of

Lincoln-Alliance Bank and Trust Company of Rochester, New York.

On March 26, 1926 appellant amended its certificate of incorporation so as to increase its capital stock to $12,000,000, consisting of 120,000 shares of the par value of $100 each (R. 376). Of these shares 1,000 represented the common stock issued and outstanding as aforesaid; 50,000 shares were classified and designated first cumulative preferred stock; and 69,000 shares (including the 48,140 shares issued and outstanding as aforesaid) were reclassified and designated second cumulative preferred stock (R. 379). The first cumulative preferred stock has no power to act in the management of appellant and is subject to redemption (R. 382, 383). The holders of the second cumulative preferred stock retain the same powers quoted above, but this stock is not subject to redemption.

Appellant has outstanding said $100,000 of common stock, $2,282,600 of first preferred stock, said $4,814,000 of second preferred stock and bonds in the amount of $6,238,000 (R. 418). The common and second preferred stocks are owned as described above. All of appellant's first preferred stock and bonds are outstanding in the hands of the public (R. 102, 103, 418).

ERRORS TO BE URGED

Appellant intends to urge the following assigned errors:

The District Court erred:

1. In finding (XIX) that New York Telephone Company has power to control appellant and that the plan providing for appellant's organization and incorporation, election of directors and the placing of its common stock

in a voting trust gave control directly and indirectly to New York Telephone Company (R. 452).

2. In concluding (I) that appellant is a wire telephone carrier subject to the Communications Act of 1934, except in so far as Sections 201 to 205 of said Act, both inclusive, shall, except as otherwise provided therein, apply to appellant (R. 453).

3. In concluding (II) that appellant is subject to regulation under the Commerce Clause of the Federal Constitution, except in so far as Sections 201 to 205 of the Federal Communications Act, both inclusive, shall, except as otherwise provided therein, apply to appellant (R. 453).

4. In concluding (V) that Congress intended "control" as used in the Federal Communications Act, to be so broadly construed as to embrace every form of control, actual or legal, direct or indirect, negative or affirmative (R. 453).

5. In concluding (VI) that by means of stock ownership, election of directors, the placing of common stock in a voting trust, and as a dominant financial feature of appellant's organization, taken together with certain contractual arrangements with New York Telephone Company, that New York Telephone Company has the power to control, directly and indirectly, appellant within the meaning of Section 2 (b) (2) of the Communications Act of 1934 (R. 453).

6. In concluding (VII) that appellant is not deprived of its property without due process of law, in violation of the Federal Constitution, by the provisions of the Order of the Federal Communications Commission quoted on page 3, *supra* (R. 453).

7. In concluding (VIII) that the Federal Communica-

tions Commission, in making and issuing the Orders complained of, and as applied to appellant, did not act in an unreasonable or arbitrary manner or exceed the power and authority delegated to it by the Communications Act of 1934 (R. 453, 454).

8. In concluding (IX) that appellant is not entitled to a decree vacating, setting aside and annulling the Orders of the Federal Communications Commission described in its petition herein and is not entitled to the equitable relief prayed for in its petition or bill of complaint (R. 454).

8. In concluding (IX) that appellant's application for a permanent injunction and other relief should be denied in all respects (R. 454).

SUMMARY OF ARGUMENT

I. THE COMMISSION, IN MAKING THE ORDER COMPLAINED OF, EXCEEDED THE POWERS DELEGATED TO IT BY THE ACT, AND THE DISTRICT COURT ERRED IN REFUSING TO REACH AN INDEPENDENT DECISION ON THE ISSUE OF EXEMPTION.

II. THE COMMISSION, IN MAKING THE ORDER COMPLAINED OF, DEPARTED FROM APPLICABLE RULES OF LAW, AND ITS ARBITRARY AND CAPRICIOUS FINDINGS WERE NOT ONLY NOT BASED ON SUBSTANTIAL EVIDENCE BUT WERE MADE IN THE FACE OF OVERWHELMING SUCH EVIDENCE TO THE CONTRARY.

III. THE DISTRICT COURT SHOULD HAVE ENJOINED THE ORDER OF THE COMMISSION AND THE DECREE BELOW SHOULD, THEREFORE, BE REVERSED.

ARGUMENT

I

THE FEDERAL COMMUNICATIONS COMMISSION, IN MAKING THE ORDER COMPLAINED OF, EXCEEDED THE POWERS DELEGATED TO IT BY THE ACT, AND THE DISTRICT COURT ERRED IN REFUSING TO REACH AN INDEPENDENT DECISION ON THE ISSUE OF EXEMPTION.

The appellees successfully urged upon the District Court that the findings and Order of the Commission were made on substantial evidence and that the Court was bound by the same. The Opinion of the Court clearly and affirmatively reveals not only that it did not consider the issue and underlying facts *de novo*, but that it considered that it was bound by the determination of the Commission:

> ". . . The Commission could find, as it did, that . . . the New York Telephone Company has power to control the petitioner.
>
> ". . . We are obliged to accord proper weight to the findings of the Commission which conducted hearings and heard argument on the questions involved. . . . The determination of the Commission under the proof here is binding upon us . . ." (R. 437).

A comparison of the Court's Opinion (R. 437) with the report of the Commission (R. 429) also indicates that the Court made no independent scrutiny of the evidence. The District Court's findings and conclusions (R. 438) were prepared and submitted to it by counsel some weeks after it rendered its opinion in accordance with the requirements of this Court's Equity Rule, LXX½ (R. 449)

These findings and conclusions (R. 439–449) are simply a counterpart of those contained in the Report of the Commission (R. 411–430).

At the outset at the hearing before the Commission, appellant challenged the power of the Commission to determine the issue of exemption (R. 31). It maintained this position throughout the hearings before the Commission and on argument in the District Court. Further, it assigns as error on this appeal the conclusion of the District Court that the Commission possessed such power (R. 448).

In the District Court, appellant introduced *all* of the evidence which was before the Commission. No new evidence whatsoever was offered by any of the parties. The Court, in the presence of this evidence, failed to exercise its independent judgment upon the issue of exemption. In this it erred.

United States v. Idaho, 298 U. S. 105.

This suit is not one brought to set aside an order of the Commission on a matter within its jurisdiction, for whether appellant is not controlled by New York Telephone Company and hence entitled to the exemption provided in the Act, *supra*, is a mixed question of fact and law (R. 427) which was left by Congress to the decision of a court —not to the Commission.

United States v. Idaho, supra.

As appellant, concededly, is engaged in interstate communication, the question as to whether it should be subject generally to the provisions of the Communications Act was one purely for the decision of Congress. Since Congress was also free to establish exceptions to its pow-

er of regulation over appellant, it *could have* delegated to the Commission the power to determine the questions of fact on which exceptions are to be based. But Congress *did not* delegate this power to the Commission, and the Act will be read in vain for even an implication of intent so to delegate. Since Congress did not delegate this power to the Commission, it follows that the decision should have been made by the Court, and that it was not bound by the determination of the Commission, however persuasive.

In *United States v. Idaho, supra,* appellant's contention is clearly illustrated and upheld. There the Interstate Commerce Act denied to the Interstate Commerce Commission the power to decide whether certain trackage was a "spur" and, therefore, excluded from the jurisdiction of the Commission. This Court held (p. 109) that the question was a "mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission." This Court concluded, therefore, that the findings and order of the Commission were not conclusive on the District Court, and that the District Court properly came to an independent determination of the issue under the facts.

By contrast, the recent opinion of this Court in *Shields v. Utah Railroad Company*, 305 U. S. —, U. S. S. C. L. ed. Adv. Opinions, Vol. 83—No. 4, page 170, also demonstrates the point which we urge here. There Congress established a category of exception to the Railway Labor Act and *expressly delegated* to the Interstate Commerce Commission the power to determine the question of fact upon which the exception turned. In such a situation, so long as there is compliance with the requirements of

due process, the courts are not concerned with the wisdom or expediency of the exercise of power validly conferred.

The point we make here we consider elementary. In our view there is involved simply an exercise by the Commission of a power not conferred upon it by the legislature. Such a view presents no issue of constitutionality. If we have thus correctly stated the question, it is clear that the cases cited in the Court's opinion (R. 437) are not there in point.

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38;
Mfgrs. Ry. Co. v. United States, 246 U. S. 457;
Interstate Commerce Commission v. Ill. Central Ry. Co. 215 U. S. 452;
Interstate Commerce Commission v. Union Pacific Ry. 222 U. S. 541;
Florida v. United States, 292 U. S. 1.

In all of said cases the delegation by Congress of the authority in question was undisputed. Under such circumstances, provided due process has been had, we concede that it is well settled that it is not the province of the courts to substitute their judgment for that of administrative bodies.

In the instant situation, Congress did not choose to delegate the power to determine the exemption to the Federal Communications Commission. That it could have done so is of no moment. That it desired to leave the decision of so intimate a matter as a jurisdictional exemption to the courts rather than to a newly created administrative body is likewise of no consequence. The fact is that it did not delegate the power to make the determination to the Commission. It was, therefore, incumbent up-

on the District Court to make the determination under the evidence. This it did not do.

II

THE COMMISSION, IN MAKING THE ORDER COMPLAINED OF, DEPARTED FROM APPLICABLE RULES OF LAW, AND ITS ARBITRARY AND CAPRICIOUS FINDINGS WERE NOT ONLY NOT BASED ON SUBSTANTIAL EVIDENCE BUT WERE MADE IN THE FACE OF OVERWHELMING SUCH EVIDENCE TO THE CONTRARY.

We have just argued under Point I that Congress did not give the Commission power to decide the issue of exemption and that the District Court erred in refusing to consider said issue *de novo*.

Both the Commission (R. 429) and the District Court (R. 437, 448) concluded that New York Telephone Company has the *power to control* appellant. We now proceed to a discussion of the term "control" as the same was used by Congress in the statute in question and to a consideration of the evidence upon which the Commission relied in making the Order in issue.

Both the Commission (R. 429) and the District Court (R. 433) concluded that Congress intentionally left "control" undefined in the statute and intended the term to include "actual" control as well as what has been called "legally enforceable" control. Assuming, for the purpose of this argument, that this interpretation is correct, we submit that New York Telephone Company has neither type of control over appellant.

A

Appellant is "legally" controlled by the voting trustees who vote two-thirds of its common stock and not by New York Telephone Company and there is no substantial evidence in the record to the contrary.

Common Stock and Voting Trust: The only stock of appellant which now or at any time is or has been entitled to vote for directors is its common stock (R. 382, 419, 435, 442). New York Telephone Company owns one-third (335) shares of this stock. A majority (actually two-thirds (665 shares)) of its entire outstanding common stock is deposited under a voting trust agreement (R. 364). This agreement designates three Voting Trustees and empowers them to exercise all rights (including the right to vote) with respect to all such stock (R. 367). These Voting Trustees are all Rochester citizens and in no way connected or affiliated with the New York Telephone Company (R. 63–66, 444). In the exercise of their control these Voting Trustees have at all times elected a board of fifteen directors, ten of whom are residents or business men within the territory served by appellant and in no way affiliated or connected with American Telephone & Telegraph Company or New York Telephone Company (R. 63–66, 444). These ten local directors are outstanding leaders in the business and civic life of Rochester, New York (R. 63–66).

Beneficial Ownership of Common Stock: The beneficial owners of the common stock deposited under the voting trust agreement and the holders, therefore, of the voting trust certificates issued thereunder are Fred. C.

Goodwin and his wife, of Rochester, New York (R. 61, 373, 418, 434, 444). Thus, if there were no voting trust today, Goodwin and wife would vote said common stock (665 shares of common). Goodwin was one of the principal witnesses at the hearings before the Commission and testified positively that the stock is never going to go out of his hands and that he has a plan worked out for passing the stock along in such a way that appellant will be kept independent of New York Telephone Company. He further testified that he intends to pass on the ultimate and beneficial ownership of that stock to his oldest son who has been with appellant for some years and is now its Secretary (R. 105). Despite this uncontroverted testimony of Goodwin, the Commission found that the placing of this common stock (665 shares) in a voting trust gave control of appellant to New York Telephone Company (R. 429, 437, 448). The record not only does not show that New York Telephone Company required or dictated this voting trust arrangement but it definitely shows that the Department of Justice, in holding that the consolidation at Rochester would not be contrary to the "Kingsbury Commitment," passed on the plan to place this common stock in a voting trust (R. 49, 50, 53, 54).

Legal Control: Clearly, therefore, the "legal" control of appellant is in the Voting Trustees who vote the two-thirds of its common stock.

The courts have uniformly held that the ownership of a majority of the voting stock of a corporation gives the owner of that stock control of the corporation. By statute law, in practically every state in the Union, the affairs of a corporation are required to be managed by its board

of directors. By similar statute law the directors are required to be elected by the stockholders of the corporation. Thus, the ultimate source of corporate control—as exemplified by what the corporation does—is vested in stockholders holding a majority of the voting stock.

Fletcher Cyclopedia Corporations (permanent Ed. Vol. 5, Sec. 2096, p. 336).

"It is too plain to bear argument that the ownership of the stock of the corporation carries with it the control of the corporation. Indeed, this is merely a different way of stating the truism that a corporation is controlled by its stockholders. That they did it through the agency of a Board of Directors and other officers does not alter the fact."

Penn. RR. Co. v. Commonwealth, 7 Atl. 368.

"It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled *by those who own a majority of their stock*. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, *is to purchase the greater part of its stock*. It was the method pursued by the Northern Pacific and Great Northern Companies to obtain *control* of the Chicago, Burlington and Quincy Railroad, and, so long as Directors are chosen by stockholders the latter will necessarily dominate the former, and in a real sense determine all important corporate acts."

U. S. v. Northern Securities Co. 120 Fed. Rep. 721, 725.

"The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of a corporation was distinctly recognized and declared in *Pearsall v. Great Northern Railway*, 161 U. S. 646, 671, 16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has been recognized and declared by other courts. *Pennsylvania R. Co. v. Commonwealth* (Pa.) 7 Atl. 368, 371; *Farmers' Loan & Trust Co. v. New York & Northern Railway Co.* 150 N. Y. 410, 425, 44 N. E. 1043, 34 L.R.A. 76; *People ex rel. v. Chicago Gas Trust Co.* 130 Ill. 268, 22 N. E. 798, 802, 8 L.R.A. 497, 17 Am. St. Rep. 319."

U. S. v. Northern Securities Co., 120 Fed. Rep. 721, 726.

"With *half* of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the *mastership* of the Northern Pacific would be assured."

Pearsall v. Great Northern Ry., 161 U. S. 646, 671.

"Every stockholder impliedly agrees, on becoming a member of the corporation, that the management and control of the corporate business and interests shall be vested in the majority."

First National Bank v. Waterloo and Fire Proof Storage Building Co., 199 Iowa 1285.

"Corporate control is usually the result either of one person having a majority of the stock, or ownership of a majority of the stock by another corporation, or ownership of a majority of the stock by

part of the stockholders of another corporation, or a combination of stockholders so as to control a majority of the stock."

Fletcher Cyclopedia Corporations, Vol. 13, Sec. 5762, p. 55.

The following quotation is from the case of *Farmers L. & T. Co. v. N. Y. & N. R. Co.*, 150 N. Y. 410, 425:

"The clear and legitimate inference to be drawn from the circumstances proved in this case is that after the N. Y. C. and Hudson River Railroad Company purchased a majority of the stock and bonds of the New York and Northern Railroad Company it *controlled* its officers and directors as fully and completely as though they had been elected by its votes. . . . Indeed, it is a matter of common knowledge that where the ownership of a majority of the stock of such a corporation changes, the Board usually changes, unless its members are already in harmony with the policy of the purchasers."

The Transportation Act of 1920 gave the Interstate Commerce Commission power to approve the acquisition (short of consolidation) of *control* of one carrier subject to the Act by another carrier. Several decisions under Section 5, Sub. 2, of the Act define the meaning of "control" as thus used.

In re *Purchase of Stock of C. A. & R. I. Ry. v. Rock Island*, 72 I. C. C. 273, the question arose as to whether a certain agreement between the Toledo, St. Louis & Western Railway, in receivership, and the Chicago, Rock Island & Pacific Railway, whereby the latter acquired part of the common and preferred stock of the C. A. & R. I.

Ry., amounting in all to 28.5% of the total outstanding capital stock of the latter, gave the Chicago, Rock Island & Pacific control of the C. A. & R. I. Ry., under Section 5, Sub. 2, of the Transportation Act of 1920. It was held that it did not.

In the Matter of the Application of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for authority to acquire control of the Peoria & Eastern Railway, 71 I. C. C. 747, it appeared that the applicant held $5,000,100 par value of the capital stock of the Peoria & Eastern Railway Co., out of $9,994,200 outstanding. The application was for authority to purchase all the outstanding capital stock *not already owned* by the applicant. The Commission said:

> "The purchase of the remaining stock of the carrier will not give the applicant any other or further *control* over such carrier than that which it had acquired prior (1890) to the enactment of the paragraph (referring to Paragraph 2 of Sec. 5 of the Interstate Commerce Act)."

In Nickelplate, Erie & Western Contract, 72 I. C. C. 151, the question arose as to what kind of control was meant by Section 5, Sub. 2, of the Transportation Act of 1920, in order to relieve the parties from the operation of the Clayton Act. The Commission said:

> "We think the control that the framers had in mind is the full and complete control which may be exercised by the owners of a majority of the capital stock of a carrier or by the lessee of the property. . . ."

Possibility of "Legal" Control: Both the Commission

and the Court below intimated that there is a possibility that New York Telephone Company may some time control appellant. A possibility is not power. The possibility that the New York Company may come into control in the future, by reason of the voting rights given to the second preferred stock, in case dividends are not paid, or by reason of some possible future acquisition of the common stock now held by the Voting Trustees, is immaterial. The question to be decided is whether the New York Company now has any such control as is contemplated by Section 2 (b) (2). As a matter of fact, it would be extremely simple for the directors of appellant to transfer absolute control to the New York Company without any change at all in the stock ownership, by the simple expedient of failing to declare dividends on the second preferred stock for such a period as would entitle that stock to full voting rights. It is not obligatory upon the directors to declare dividends, even if earned; and during the depression appellant for several years failed to earn enough to pay the full dividends on the second preferred stock (R. 117, 118). If the appellant's directors had had any intention or desire to turn over control to the New York Company, they could easily have done so during the depression by passing the dividends on the second preferred and common stocks, and they would have had a reasonable excuse for passing these dividends, in the practice of numerous corporations which did so during the depression when current earnings were insufficient to cover them. The fact that they did not do so, but continued to pay the full dividends, even at the expense of dipping into the surplus of appellant, is strong evidence of the intention of the board of directors of appellant to maintain its independ-

ence of the New York Company. It has further been shown that the present surplus of appellant, assuming only that it continues its earnings at the rate of return during the depression, will be sufficient to pay the interest on the bonds and dividends on both issues of preferred stock for something over forty years (R. 142, 420, 435, 443). So that even if the possibility or likelihood of the second preferred coming into full voting power were material on the question of present control, that likelihood and possibility have been completely negatived.

And, indeed, the Commission's Examiner conceded at the hearing that control at the present time and not possible future control is the type of control embraced by the Act.

> "Mr. Nixon : Are we talking about actual control of this company now or of the possibility of the control passing away in the future sometime to somebody else? I had supposed that we were directing this inquiry to where control lies at the moment.
>
> "The Examiner: That is the issue." (R. 105).

"Veto Power" Over Extraordinary Acts: The Commission and the Court below stressed the fact that New York Telephone Company, by reason of its ownership of the second preferred stock and thirty-three and one-half percent of the common stock of appellant, can prevent it from consolidating with any other corporation; leasing, selling or conveying its property or franchises, other than in the ordinary course of business; increasing or reducing its capital stock; issuing preferred stock, other than provid-

ed for in the certificate of incorporation; guaranteeing the bonds of any other corporation; altering or amending its own certificate of incorporation. The second preferred stock likewise has voting power on all propositions, except for the election of directors of the corporation, or the amendment of its by-laws, as to which the second preferred will not be entitled to vote unless default is made in the payment of the dividends thereon for two successive fiscal years. The evidence is that, assuming that appellant's earnings continue only at the average for the last three years, which have been the lowest in its history, it will be able to continue to pay dividends on the preferred stock out of surplus for forty years or more (R. 142).

The mere existence in New York Telephone Company of a power to *veto* the various *unusual* acts specified above, does not give it any such control of appellant as the statute contemplates because even the total inability of appellant to perform those acts would not affect the normal conduct of its business. It is to be noted that even with regard to these acts, New York Telephone Company *cannot compel the performance of any of them*, because the consent of at least eighty percent of the common stock is required, and sixty-six and one-half percent of that stock is held by the Rochester stockholders.

It is submitted that the intention of Congress was that the term "control" should be given a fair and reasonable interpretation, with a view to making the statute effective to remedy such evils as may have existed in the situation before the statute was passed. It is a well settled rule for the interpretation of statutes that in determining their meaning reference may and should be had to the situation which the statute was intended to correct.

Federal Trade Comm. v. Western Meat Co., 272 U. S. 554.

Texas and P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 210.

Holy Trinity Church v. United States, 143 U. S. 457.

In the present case, the intention of Congress was obviously to prevent carriers which are really engaged in interstate business from removing substantial parts of their business, properly subject to federal regulation, from the jurisdiction of the Commission by the device of having such business conducted by a technically separate subsidiary corporation whose business operations are, however, under the actual control of the interstate carrier; and similarly to prevent such a carrier escaping the jurisdiction of the Commission by any device whatsoever, whether specifically mentioned in the statute or not. In view of the fact that the ingenuity of lawyers in thinking up new devices for such purposes is apparently boundless, Congress was doubtless well advised in not attempting to specify or define in any way what would constitute control by one carrier of another. There was, however, no reason for Congress attempting to subject to the jurisdiction of the Federal Communications Commission companies whose business is essentially intrastate, and whose ordinary business, including the fixing of rates and all its regular business practices, is free from any control by an interstate carrier. Such companies are in practically every case subject to the jurisdiction and control of the state public service or similar commissions. It was obviously with this in

view that Congress included in the law the exemption contained in Section 2 (b) (2). It recognized, as any one must recognize, that any telephone company which seeks to furnish a reasonable service to its subscribers under modern conditions must be connected with the Bell system for the purpose of toll calls, but so long as the Bell system has no power to direct, manage, or in other words "control," the ordinary business activities of the local company, there is no reason for attempting to subject the local company to the jurisdiction of a federal commission. The federal Commission has ample power to control the rates and practices as to interstate toll calls, not only by reason of its control of the interstate companies but by virtue of Sections 201–205 of the Act which appellant concedes are applicable to it (page 3, *supra*).

The rates, charges and ordinary business practices of appellant herein are determined by its officers and board of directors, subject, of course, to regulation by the Public Service Commission of the State of New York, as provided by the statutes of New York State. To some extent, the actions of the directors are controlled by the by-laws of appellant. New York Telephone Company, by reason of its ownership of the second preferred stock, has no vote either in the election of directors or as to amending the by-laws, and probably could not have any such vote for at least forty years. By reason of its ownership of thirty-three and one-half percent of the *common* stock, it does have a vote, but not a controlling vote, on these questions. The election of directors and the amendment of the by-laws are both controlled by the Rochester stockholders, who hold sixty-six and one-half percent of the common stock. New York Telephone Company actually has in the

past nominated five, out of the total number of fifteen directors of appellant. But even if all five regularly attended the directors' meetings, they could be outvoted by the local directors, nominated and chosen by the local stockholders. The evidence is that, on the average, the directors' meetings are attended by seven of the local directors, and from two to three of the New York Company directors (R. 129).

If the existence of a mere veto power on such unusual acts amounts to "power to control" (R. 425, 437) then it must be true that a minority of the States of this country control the Federal Government, by reason of the fact that they are able to prevent the adoption of any amendments to the Constitution of the United States. Under the statutes of the State of New York it requires the consent of at least two-thirds of the total number of shares entitled to vote in order for a corporation to mortgage its property and franchises (Stock Corporation Law, Sec. 16), to sell and convey its property, rights, privileges and franchises (id. Sec. 20), to consolidate with another corporation (id. Sec. 86), or to dissolve (id. Sec. 150). It would be true, if the Commission is correct, that the holders of a minority interest in the stock of every New York Corporation control that corporation, although they may be unable to elect a single director or to have any say whatsoever as to the conduct of the corporation's regular business.

There is no question that the New York Company has a substantial interest in the prosperity of appellant by reason of the transfer to it of something over $4,000,000 worth of assets of the New York Company and the issuance to the New York Company, in return for those

assets and for cash advanced, of all of the second preferred stock and approximately one-third of the common stock. There can also be no question that in order to protect this investment the New York Company has been given power to prevent or veto a number of drastic or extraordinary acts on the part of appellant, any of which might tend substantially to lessen the value of the New York Company's investment, or result in the Rochester Telephone Corporation practically going out of business. This veto power, however, does not give the New York Company any ability to control the ordinary operations of appellant.

B

Appellant is "actually" controlled by the voting trustees aforesaid and not by New York Telephone Company, and there is no substantial evidence in the record to the contrary.

"Actual" Control: It has been pointed out above and we submit, clearly and conclusively, that New York Telephone Company does not "legally" control appellant. One might consider that this so-called "legal" test reflects the conventional or perhaps old fashioned concept of corporate control.

Modern development of the corporate system has in many instances brought about such a separation of ownership and control that the application of the conventional or "legal" test to many present-day corporations will not reveal the actual source of control. There has, accordingly, arisen the concept of control which we may call "actual," which looks behind outward forms to the real source from which the power to manage springs.

Berle and Means, The Modern Corporation and Private Property (1932), Chap. V, pages 69–118. Recognizing this trend, Congress, in using the term "control" in Section 2 (b) (2) of the Communications Act, *supra*, intended it to embrace not only "legal" control but "actual" control by whatever device or artifice employed (page 3, *supra*).

Regardless of the source of the power, however, whether it be "legal" or "actual," control, as used in connection with corporations, still means ". . . the actual power to select the board of directors, (or its majority) . . ." (*Berle and Means, supra*, page 69).

Although the Commission (R. 429) and District Court (R. 433) stated that Congress, in using the term "control" in the Act, *supra*, intended to include both the "legal" and "actual" concepts of the term, they neglected completely to distinguish the two concepts in applying the term to appellant. It necessarily follows, however, that the Commission concluded that appellant is "actually" controlled by the New York Company, despite the overwhelming evidence in the record to the contrary. We proceed to a review of this evidence.

Business Relations: Appellant has always done its own financing (R. 67, 68, 445). Mr. Goodwin himself conducted all of the negotiations for the sale of the preferred stock issued in 1926 (R. 63). In 1928 he arranged for the sale of $5,000,000 of four and one-half percent bonds and out of the sale price $3,500,000 of six percent bonds were retired, leaving about $1,500,000 for extensions and additions to plant (R. 67). The last financing done by appellant, in the Fall of 1935, was handled by Mr. Goodwin personally (R. 68). Never-

since the organization of appellant in 1921, has it had any financial assistance from New York Telephone Company or any "Bell" company, except a loan of $150,000 for working capital when it was first organized and which was paid back within a few months (R. 68).

The majority of the purchases of supplies and equipment are made from independent manufacturers and local jobbing concerns, the principal telephone equipment being purchased from Stromberg-Carlson Telephone Manufacturing Company at Rochester (R. 130, 131).

Proposals for new construction, additions to the plant and matters of that nature originate in the Engineering or other proper department of appellant (R. 126), and it has never had any engineering assistance from New York Telephone Company because it has an Engineering Department of its own (R. 126, 199, 200).

No so-called license fees are paid by appellant to New York Telephone Company and no part of its gross revenues has ever been paid to New York Telephone Company except for services actually performed and at rates which were considered reasonable (R. 109, 130).

Every officer of appellant who was employed by that corporation at the date of its organization in 1921, if alive, is still an officer of appellant (R. 65, 66, 132), whereas the evidence is that the personnel of the staff of New York Telephone Company changes frequently (R. 65).

The record shows a number of important differences between practices followed by appellant and practices followed by New York Telephone Company in similar matters, such as the setup and contents of the telephone directory (R. 133), the observance of holidays (R. 134), the method of payment for coin box collections (R. 134),

scheduled rates for services (R. 135) and other matters (R. 446).

There are fifteen directors of appellant, ten of whom are outstanding Rochester citizens entirely independent of New York Telephone Company (R. 63–66, 422, 437, 444). New York Telephone Company elects five of these fifteen directors because of its ownership of 335 shares of the common stock and the provisions for cumulative voting applicable to that stock (R. 63, 107, 384, 423, 437, 444). Out of that number the entire five were present at only one meeting of the board of directors. Three or four times four of the five were present at a directors' meeting. At over ninety percent of the directors' meetings there have been less than three of the New York Telephone Company directors present (R. 129, 446). The local directors outnumber the "Bell" directors two to one and the average attendance at all the directors' meetings is about seven Rochester directors to three or less of the "Bell" directors. The only time the "Bell" directors ever come to Rochester is to attend meetings of the board of directors and the only times the President and General Manager of appellant has ever seen any "Bell" director in Rochester, except at the regular monthly meeting of the board of directors, were on three occasions, each of which was at the funeral of some officer or director of appellant (R. 216, 217).

History: The Commission concluded that the plan providing for appellant's organization was designed for the express purpose of enabling the New York Company "to have and retain the power to control the functions of" appellant and "that such purpose has been fully accomplished" (R. 429).

This sweeping statement as to the express purpose of the organization of appellant can be sustained only on the assumption that the testimony given by the witness, Fred. C. Goodwin, is false, and that the Attorney General of the United States was negligent, to say the least, in enforcing the provisions of the Kingsbury Commitment. It appears clearly from the testimony as a whole, that the entire purpose of the organization of appellant was to establish a corporation for conducting the telephone business of Rochester and vicinity which would be independent of and free from the control of New York Telephone Company and the Bell system (R. 36–54). There is nothing in the testimony to indicate in any way that Mr. Goodwin's statements were either false or erroneous and, since there was absolutely no proof offered to the contrary, they should certainly have been accepted.

Furthermore, the Bell system had agreed, by the Kingsbury Commitment, that it would not acquire, directly or indirectly, dominion or control over any other telephone company operating in competition with the Bell system (R. 36, 296, 415). As stated in the Report of the Telephone Division, it was, therefore, necessary, before the acquisition by New York Telephone Company of the independent company in Buffalo could be carried out, that the approval of the Department of Justice be first obtained; and, as shown by the testimony of Mr. Goodwin and the report of the Telephone Division, this approval could not be obtained unless at the same time the Bell system agreed to "relinquish and dispose of approximately the same amount of its own facilities to other independent companies" (R. 40, 415). The entire plan for the acquisition by New York Telephone Company of the independent com-

pany in Buffalo and for the organization of independent companies in Rochester and Jamestown, and the transfer to them of the New York Company's facilities, was submitted to the Department of Justice and was carried out exactly in accordance with the plan as submitted (R. 59). Unless the Department of Justice was remiss in its duties to the Government of the United States, it must, therefore, have found that appellant, as about to be organized, was and would be an independent company free from the control of the Bell system. The details of the stock ownership, upon which the Report of the Commission was largely based, were included in the proposal submitted to the Department of Justice, and it must accordingly have found that such stock ownership would not give control to the New York Company.

It is significant that the Commission decided that Jamestown Telephone Corporation is exempt from the Act, *supra*, under Section 2 (b) (2) thereof, *supra*, although the plan for the organization of appellant and Jamestown and the acquisition by New York Telephone Company of the independent company in Buffalo were simultaneously submitted to and approved by the Department of Justice under the Kingsbury Commitment. In addition, the stock setup of Jamestown Telephone Corporation, as it relates to New York Telephone Company, is substantially similar to such relationship of appellant to New York Telephone Company. *In the Matter of Jamestown Telephone Corporation*, 4 F. C. C. 326 (1937).

In this connection, some point was made by the Commission (R. 422, 423) and by the Court below (R. 436) that the money which was used to pay for the 665 shares of common stock of appellant, now held by Mr. Goodwin

and his wife, was advanced by the New York Company to Messrs. Fuller, McCanne and Zoller, and it was intimated that calling this advance a payment to these gentlemen for services was merely camouflage. It is patent, however, that the services of these men in bringing about the organization of Rochester Telephone Corporation were of very great value to the New York Company. If appellant had not been organized, the New York Company would have been unable to acquire the property and franchises of the independent company in the larger territory of Buffalo (R. 39, 90). Furthermore, by the organization of appellant a situation in Rochester, under which both the New York Company and the existing independent company were doing business as competitors, at a loss, was eliminated, and an arrangement was made by which the New York Company obtained a reasonable chance of receiving some return on its investment in the telephone business in Rochester and the neighboring territory (R. 71–76). Subsequent events have shown that in fact the New York Company has received such a return on its investment ever since the end of the second calendar year after the organization of appellant. There is no reason, therefore, for a finding that the payment for services by the New York Company to the persons chiefly responsible for the organization of appellant was in fact only a gift.

Even if this payment to Messrs. Fuller, McCanne and Zoller was in fact a pure gift by New York Telephone Company, and was only called a payment for services for some such purpose as the deception of the New York Public Service Commission, it did not result in the New York Company obtaining any control of the 665 shares of the

common stock which were purchased with this payment. That stock was issued to Rochester men, who were in no way connected with New York Telephone Company, and under an agreement that it would be put in a voting trust (R. 41, 49, 50, 60, 82, 92). It is now owned by Goodwin and wife, so far as the beneficial ownership is concerned; and even if the original holders had been in some way subject to the domination of the New York Company (of which there was no proof whatsoever), there is absolutely nothing to show that either Goodwin or his wife is subject to any such domination, and he testified positively that they were not (R. 92, 104, 105). Consequently, even if the New York Company originally intended to obtain control of this major portion of the voting stock of appellant, it has certainly failed to do so; and even if it had any control of this stock in the past (which it obviously did not), it has no such control in the present.

Toll Switchboard: The Commission's Report indicates that it may have attached some slight importance to the fact that appellant employs New York Telephone Company to switch some of its intraterritorial (intrastate) toll calls, namely, all such calls originating or terminating in the City of Rochester (R. 424–427). The reason for this practice was pointed out by appellant's President and General Manager, who testified that it is impractical to have two toll boards at Rochester and that it is more economical to make use of the toll board which the New York Company maintains at Rochester for calls originating and terminating beyond the territory of appellant (R. 174, 175, 194, 195, 196). An engineer, who gave the only testimony offered by the Commission, denied neither the as-

sertion of impracticality nor the claim of economy, but confined himself merely to stating (upon very limited experience) that he knew of no parallel situation in the telephone industry (R. 245–251). Moreover, he conceded that appellant is in a class by itself (R. 251). Appellant was not prepared with statistics relating to this toll board situation (which was raised by the Commission at the hearing on cross-examination) and requested leave to present additional evidence on this issue (R. 426). The Commission did not comply with this request because it stated that, since the point was too minor to affect its conclusion on control, additional evidence would be of no consequence (R. 427).

Contractual Arrangements: Both the Commission and the Court below referred to certain contractual relations between appellant and New York Telephone Company as factors bearing on the issue of control (R. 429, 437). There are three contractual relationships between appellant and New York Telephone Company.

The first of these is a traffic agreement which became effective January 1, 1929 and provides for the establishment of physical connection of the lines of both Companies and the interchange of telephone communications between the two systems. It covers the division of charges made for long distance telephone calls which are transmitted by use of the joint facilities of both Companies (R. 254–283). This traffic agreement is the standard agreement used between New York Telephone Company and connecting companies (R. 196).

The second contract is a facilities agreement dated January 1, 1923 covering the interchange of pin rental, wire rental, joint pole lines, conduit rental and rental of various

types of plant and equipment (R. 284–295). In short, this agreement provides for situations where both Companies require joint facilities in the territory of appellant and in such cases, to avoid duplication, one of the parties furnishes the facilities in accordance with the terms of said agreement. It is this agreement (R. 293) which covers the payments made by appellant to the New York Company for the service of its toll board in switching intra-territorial toll calls at Rochester. Appellant's use of the New York Company's toll board has just been discussed above (page 40, *supra*).

The third agreement between appellant and New York Telephone Company is a lease by the terms of which appellant leases certain space in the building where appellant's main telephone exchange at Rochester is located to the New York Company. This is the building at which the New York Company's toll board is located (R. 198, 410, 410B).

It is submitted that these contractual arrangements in no way indicate control of appellant by New York Telephone Company. Concededly, appellant maintains physical connections with the lines of the New York Company (R. 1, 135). Naturally, some sort of an agreement for division of charges is necessary, and the record shows that the traffic agreement is the standard contract which the New York Company enters into with all of its connecting carriers (R. 196, 198). The facilities agreement covering the joint use of poles, wires, etc., obviously makes for both efficiency and economy and is a matter of common practice not only of telephone utility companies but of gas and electric companies.

Appellant's President. The fact that the man who is

now President and General Manager of appellant once (prior to 1920) was connected with a telephone company, in which the New York Company had a stock interest or possibly even control, was brought out by the Commission at the hearing for the apparent purpose of suggesting that this might have a bearing on the issue of control (R. 116, 139). Neither the Commission in its Report, nor the Court below in its Opinion, made any mention of this fact. It is a matter of common knowledge that it is very difficult to find an experienced telephone man who has not, at some time or another, been connected with the "Bell" system. It may also be pointed out in this connection, that at the time appellant commenced business in 1921, its President was an "independent" man who was also an executive of the old "independent" Rochester Telephone Company (R. 38, 41, 116). Further, the present Vice-President and Chief Engineer of appellant, who testified at the hearings before the Commission, is also a former executive of the old "independent" Rochester Telephone Company (R. 225). In short, any inference that might be drawn from this feature of the record is too weak to warrant consideration.

Radio Wire Facilities: Some point was made at the hearing before the Commission that the furnishing of wire facilities by appellant to two Rochester radio broadcasting companies (in no way connected with New York Telephone Company) might have a bearing on control. The record shows that these facilities furnished by appellant consist simply of the leasing of "dead" circuits (or pairs of wires) to connect the studios and transmitters of these companies, and also to connect the studios with certain "spot" locations (R. 224–227). The current for these

"dead" wires is not supplied by appellant. It seems quite obvious that this feature of appellant's business could not have any bearing on the question of whether it is controlled by New York Telephone Company, and this the Commission conceded in its Report (R. 429).

RÉSUMÉ OF POINT II

Under Point II above we have considered the term "control" as the same was intended to be used by Congress in the statute in question. We have sought to analyze the term in both its "legal" and "actual" aspects and to test its applicability to appellant in the light of the facts disclosed by the record. We submit that the Commission and the District Court (which adopted the Commission's Report without independent determination) departed from applicable rules of law in applying the term "control" to appellant. We submit further that the record reveals irresistably that the New York Company does not control or have the power to control, appellant and that it has never even attempted to exercise control over appellant in any manner whatsoever. The contrary conclusion of the Commission is not founded on substantial evidence and was in fact made in the face of overwhelming such evidence to the contrary. Appellant is here entitled to judicial review.

Interstate Commerce Commission v. Ill. Cent. R. Co., supra, (p. 470);
Interstate Commerce Commission v. Union P. R. Co., supra, (pp. 547, 548);

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 91;
St. Joseph Stock Yards v. The United States, *supra*, (p. 51).

An analysis of the Commission's Report, which was adopted by the Court below in its Opinion, compels the conclusion that appellant's claim of exemption was approached not only with suspicion but with preconceived intent to deny the exemption. Apparently convinced that the New York Company intended to control appellant from the time of its organization, the Commission overlooked the fact that whatever the intentions of the New York Company were, or are, the fact is that such control has never been obtained or exercised.

III

THE DISTRICT COURT SHOULD HAVE ENJOINED THE ORDER OF THE COMMISSION AND THE DECREE BELOW SHOULD, THEREFORE, BE REVERSED.

Respectfully submitted,
T. Carl Nixon,
Counsel for Appellant.

Justin J. Doyle,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 481

ROCHESTER TELEPHONE CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Appellees.

APPELLANT'S SUPPLEMENTAL BRIEF ON ISSUE OF JURISDICTION

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Of Counsel.

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PRELIMINARY STATEMENT

This case comes to this Court under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 220, Chap. 32, 28 U. S. C. Sec.'s 47, 47a).

The jurisdiction of the Court below was not questioned by the appellees. It was they who prepared and submitted the conclusion made by the District Court that: "This court has jurisdiction of the action and of all parties hereto." (R. 447). None of the parties has assigned this conclusion as error on this appeal (R. 452–454). It follows, therefore, that the District Court dismissed appel-

lant's bill on the merits—not for lack of jurisdiction (R. 447, 450).

Appellant has prepared this brief for submission against the possibility that the issue of jurisdiction (as it is affected by the *nature or character* of the Orders sought to be reviewed) may be raised on this appeal either for the first time by the appellees or by this Court. Jurisdiction in general has already been covered by appellant in its separately printed "Statement as to Jurisdiction" and in its main Brief (pp. 1, 2).

ARGUMENT

I

THE FINAL ORDER OF THE COMMISSION AND ITS GENERAL ORDERS WITH WHICH APPELLANT WAS DIRECTED TO COMPLY PURSUANT TO SAID FINAL ORDER ARE REVIEWABLE UNDER THE URGENT DEFICIENCIES ACT AND THE DISTRICT COURT, THEREFORE, HAD JURISDICTION OF THIS SUIT.

Prior to making its final Order of November 18, 1936 (R. 430) the Commission directed that appellant comply with certain general Orders (R. 21–30). These general Orders require appellant to file a number of reports with, and submit voluminous data to, the Commission (R. 21-30). Appellant refused to obey these general Orders. An *actual controversy* ensued between appellant and the Commission over their validity (Petition, R. 2, 3). But appellant did not at once seek relief in the courts. It preferred first to exhaust its remedies before the Commission (Peti-

tion. Par. Seventh, R. 2). This alternative has long had the approval of this Court.

It was in consequence of the above controversy that hearings were held by the Commission resulting in its Report (R. 411) and final Order. This final Order reads as follows:

> "Pursuant to the Report of the Commission issued by the Telephone Division herein, it is hereby ordered that the Rochester Telephone Corporation, as a wire telephone carrier, be, and the same is hereby, classified as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000" (R. 430).

For convenience, appellant's main Brief usually refers only to the final Order of the Commission, since by its terms it is made applicable to and incorporates by reference the previous general Orders (appellant's main Brief, p. 3). *All of these Orders, however, were attacked in the District Court and are attacked on this appeal.* This suit was brought to enjoin *both* said final Order and said general Orders (Petition, R. 2–5). In its Brief in the District Court appellant asked that "the Orders described in the Petition" be enjoined, set aside and annulled. The conclusions of the District Court in respect to *all* of said Orders are assigned as error on this appeal (appellant's main Brief, p. 15; R. 453, 454, 456). Further, appellant's "Statement as to Jurisdiction" shows clearly (pp. 2, 3) that this suit attacks both said general Orders and said final Order.

The forepart of the final Order of the Commission quoted above merely determines the status of appellant under the Communications Act of 1934 (Act of June 19, 1934, Chap. 652, 48 Stat. at L. 1064, Chap. 652, 47 U. S. C., Sec. 151). This determination standing by itself might not be reviewable, *Lehigh Valley R. R. Co. v. U. S.*, 243 U. S. 412, 414, *Shannahan v. U. S.*, 303 U. S. 596, 599, but the latter portion of said final Order directs that appellant be subject to all orders of the Telephone Division of the Commission applicable to wire telephone carriers whose annual gross operating income exceeds $50,000. Such general Orders (of the Telephone Division) *had already been made and served upon appellant* (R. 21–30). Thus when the latter portion of said final Order is read together with said prior general Orders (as they must and were obviously intended by the Commission to be), it is patent that appellant was at once under a series of affirmative, final and imminent mandates.

Perhaps if the general Orders had not previously been made, the latter portion of the final Order might be said to constitute a mere notification and, hence, not subject to review. But it must be kept in mind that the final Order resulted from and relates back to an actual controversy over the general Orders (R. 2, 3). If this were not so, the latter portion of the final Order would obviously be surplusage. Separation of the final Order from the general Orders ignores the realities of the situation and sacrifices substance to form. This Court has said that ". . . overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect."

Powell v. U. S., 300 U. S. 276, 285.

The purpose of the final Order of the Commission was to compel appellant forthwith to comply with the previous general Orders to which said final Order referred. The general Orders are not only orders in form but are definitely affirmative in form and substance. Authoritatively and unequivocally they command appellant to do something, to wit, to file reports and submit extensive data to the Commission (R. 21–30).

> *American Telephone & Telegraph Co., et al. v. U. S.*, 299 U. S. 232, affirming 14 Fed. Supp. 121.

The effect of the Orders was to deprive appellant of the privilege or license granted it by Section 2 (b) (2) of the Communications Act, *supra*. The Orders had the immediate effect of changing appellant's status. No longer was it to be subject to regulation solely by the New York State Public Service Commission—it was now also to be under the regulatory power of a federal Commission. In addition, the failure to comply with said Orders by appellant rendered it at once subject to civil suit under Section 401 of the Communications Act, *supra*, and criminal penalties under Sections 501 and 502 thereof. Unlike the situation in *Lehigh Valley R. R. Co. v. U. S.*, *supra*, the risk to which appellant was now immediately subjected proceeded from the Orders and not from the Act.

We do not have here, as in *Lehigh Valley R. R. Co. v. U. S.*, *supra*, an order negative in substance as well as in form, nor do we have a negative order which cannot be violated or call for enforcement as in *Piedmont & Northern Ry. Co. v. U. S.*, 280 U. S. 469. The instant Orders

were forthwith enforceable by the Commission in ... courts (Section 401 of the Communications Act, *supra*).

As in *U. S. v. New River Co.*, 265 U. S. 533, the ... presented more than merely a case where affirmative ... sought by the carrier is denied by the Commission. ... is not "merely preparation for possible action in some ... ceeding which may be instituted in the future," *Shaw ... v. U. S.*, *supra*, (p. 599), but definite, present action ... nant with finality.

If the Orders in question are not reviewable under ... provisions of Section 402 (a) of the Communications A... *supra*, it is earnestly submitted that such provisions ... meaningless and in effect grant no review at all.

II

SINCE THIS COURT HAS JURISDICTION TO REVI... THE ORDERS OF THE COMMISSION, THE CASE SHOU... BE HEARD ON THE MERITS AND THE DECREE BE... REVERSED.

Respectfully submitted,
T. Carl Nixon,
Counsel for Appellant.

Justin J. Doyle,
Of Counsel.

No. 481

In the Supreme Court of the United States

OCTOBER TERM, 1938

ROCHESTER TELEPHONE CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the United States District Court for the Western District of New York (R. 431) is reported in 23 F. Supp. 634.

JURISDICTION

The decree of the District Court was entered on October 21, 1938 (R. 449). Petition for appeal was filed November 9, 1938 (R. 451), and was allowed the same day (R. 454).

Jurisdiction is conferred on this Court by Section 402 (a) of the Act of June 19, 1934, c. 652, 48

Stat. 1093 (U. S. C., Title 47, Section 402 (a)), and by the Act of October 22, 1913, c. 32, 38 Stat. 220 (U. S. C., Title 28, Section 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Section 345).

QUESTIONS PRESENTED

1. Did the specially constituted district court have jurisdiction to review the determination of the Federal Communications Commission that the Rochester Telephone Corporation is controlled by the New York Telephone Company within the meaning of Section 2 (b) (2) of the Communications Act of 1934?

2. Should the determination of the Federal Communications Commission that the Rochester Telephone Corporation is controlled by the New York Telephone Company within the meaning of Section 2 (b) (2) of the Communications Act of 1934 be sustained if it is supported by substantial evidence?

3. Is the Rochester Telephone Corporation controlled by the New York Telephone Company within the meaning of Section 2 (b) (2) of the Communications Act of 1934?

STATUTES INVOLVED

The sections of the Communications Act of 1934 (48 Stat. 1064; 47 U. S. C. A. § 151) primarily involved in this case follow:

> Sec. 2 (a) The provisions of this Act shall apply to all interstate and foreign

communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided . . .

(b) Subject to the provisions of section 310, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier; except that sections 201 to 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2).

The other pertinent provisions of the Communications Act of 1934 are set forth in the appendix to this brief, *infra* pages 78 to 89.

STATEMENT

This is an appeal from a decree of a specially constituted three-judge district court, dismissing a bill in equity brought to set aside and enjoin an

order of the Federal Communications Commission issued on November 18, 1936, which classified the Rochester Telephone Corporation, insofar as it engages in interstate and foreign communication, as a carrier subject to all of the common carrier provisions of the Communications Act of 1934, and, as such, subject to all general orders of the Commission applicable to wire telephone carriers whose annual gross operating revenues exceed $50,000 (R. 430).

At various times between July 20, 1934, and September 13, 1934, the Telephone Division of the Federal Communications Commission, pursuant to its authority under the Act, promulgated certain general orders, numbered 1, 2, 3, 5, 6a and 9, which in substance required telephone carriers subject to its jurisdiction to report to the Commission detailed information concerning their operations, corporate structure, and management (R. 20, 21, 23, 24, 25, 26, 28).

Upon the failure of appellant, Rochester Telephone Corporation, to respond to these orders, the Telephone Division of the Commission issued an order on October 14, 1935, which it amended on November 13, 1935, requiring appellant to show cause why it should not be required to file responses to the General Orders enumerated above (R. 5-7). Appellant filed its verified answer to the amended order and requested a determination of its status under Section 2 (b) (2) of the Act exempting

local telephone carriers not owned or controlled by or controlling a connecting telephone carrier, and the issuance of an order declaring that it was not subject to the jurisdiction of the Commission, except as to the requirements of Sections 201–205 of the Act (R. 2).

On January 8 and 16, 1936, hearings were held before an examiner of the Commission for the purpose of taking evidence to determine whether appellant was controlled by the New York Telephone Company with whom it connects (R. 30–252). Appellant filed a special appearance denying the jurisdiction of the Commission and contending that the burden of proof was on the Commission to show that it did not come within the statutory exception (R. 31). The examiner overruled the contention of appellant regarding the burden of proof and proceeded to a hearing of the controversy (R. 33). After an extensive hearing, the examiner filed his report with the Commission recommending that it find that appellant was under the direct or indirect control of the New York Telephone Company (R. 3). The matter was argued orally and briefs were filed by appellant taking exceptions to the recommendations of the examiner (R. 3). On September 28, 1936, the matter was submitted to the Telephone Division of the Commission on the question as to whether the recommendation of the examiner should be adopted, and on November 18, 1936, the Commission (through its

Telephone Division) filed a decision finding that appellant is under the control of the New York Telephone Company and hence subject to the jurisdiction of the Commission (R. 411–430). On the same day the Commission (through its Telephone Division) issued an order classifying appellant as a wire telephone carrier subject to all the common carrier provisions of the Communications Act of 1934 and to all general orders of the Commission applicable to such wire telephone carriers (R. 430). Appellant filed a petition for rehearing before the entire Commission (R. 3). On January 27, 1937, this petition for rehearing was denied by the full Commission (R. 4).

On March 18, 1937 appellant filed a bill in equity in the United States District Court for the Western District of New York, seeking to enjoin and set aside the Commission's determination (R. 1–5). The bill alleged, among other things, that the appellant was engaged in interstate and foreign communication solely through physical connection with the facilities of the New York Telephone Company and that it was not directly or indirectly controlled by that Company (R. 1); and that the Commission erred as a matter of law in determining that appellant was directly or indirectly controlled by the New York Telephone Company within the meaning of Section 2 (b) (2) of the Act since the facts established before the Commission by undisputed and uncontradicted evidence demonstrated that no

such control existed (R. 4). The bill further alleged that if, upon the facts established before the Commission by undisputed and uncontradicted evidence, appellant is, under the terms of the Act, subject to the common carrier provisions of said Act, then the Act is unconstitutional since it exceeds the powers of Congress and violates the provisions of the Constitution (R. 4).

Appellant offered no new evidence in the trial of the cause in the court below. The specially constituted three-judge District Court dismissed the bill in equity upon the record made before the Commission. *Rochester Telephone Corporation* v. *United States, et al.*, 23 F. Supp. 634. In a unanimous opinion the court, after carefully reviewing the evidence before the Commission, held: "The plan providing for the organization and incorporation, election of directors and placing the common stock in a voting trust gave control directly and indirectly to the New York Telephone Company." and that hence "The petitioner does not come within the exemption of the statute as set forth in § 2 (b) (2)." 23 F. Supp. 634 at 638. The court filed, pursuant to equity rule 70½, the findings of fact and conclusions of law upon which its decision was based (R. 438–449).

SUMMARY OF ARGUMENT

The determination of the Federal Communications Commission classifying appellant as subject to the jurisdiction of the Commission and the gen-

eral orders applicable to such wire telephone carriers is not an order which is reviewable under the terms of the Urgent Deficiencies Act of 1913. The determination of the Commission neither commands nor directs appellant to do or to refrain from doing anything. *Shannahan et al* v. *United States*, 303 U. S. 596, 599. With respect to the instant order, the Commission could not have instituted a proceeding to enforce it and consequently the court below had no jurisdiction to set aside such an order. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282. The order of the Commission which appellant seeks to review in this case does not constitute the basis of the actual controversy. That such an order is non-reviewable is demonstrated by the opinion of this Court in *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412.

The court below and the Federal Communications Commission correctly interpreted the exemption provision of Section 2 (b) (2) of the Communications Act in holding that, upon the evidence presented in the course of its hearings, appellant was controlled by the New York Telephone Company. The congressional reports considering the legislative antecedents of the Communications Act of 1934 clearly demonstrate that Congress intended the term "control" to embrace every form of control, actual or legal, direct or indirect, negative or affirmative, and to include also the power to control regardless of whether that power was being affirma-

tively exercised at a particular time when the issue was raised before the administrative body (House Report 1850, 73rd Cong., 2nd Sess., pp. 4 and 5).

The evidence in the record before the Federal Communications Commission clearly shows that the New York Telephone Company controls appellant. The New York Telephone Company owns all of the second preferred stock (48,140 shares) of appellant, which possesses equal voting rights with the common stock except in the selection of the members of the board of directors and in amending the By-Laws. The New York Telephone Company also owns 33½ per cent (335 shares) of the common stock of appellant which possesses full voting rights except that on matters of major importance the vote or consent of 80 per cent of the holders of the common stock is necessary. By virtue of this veto power the New York Telephone Company is in a position to check or control the action of the majority of the common stock which is deposited in a voting trust. By means of cumulative voting provisions in the certificate of incorporation the New York Telephone Company is assured of electing five of the fifteen members of the board of directors of appellant and two of the five members of the executive committee of appellant. Furthermore, the history of appellant and of the voting trust supports the conclusion that appellant is controlled by the New York Telephone Company.

In view of these circumstances the court below properly concluded that the New York Telephone Company possessed the power to control appellant.

The opinion of the court below and its elaborate findings of fact and conclusions of law filed with the decree clearly indicate that the court weighed and independently considered the evidence before the Commission. The court below, in the exercise of its independent judgment on the facts, properly accorded some weight to the determination of the Commission. This was not error. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 53; *Heath* v. *Wallace,* 138 U. S. 573, 583. But even if the court below had not independently weighed the evidence, this would not have been error. The findings of administrative agencies, in the course of regularly conducted hearings, are binding upon the reviewing court if supported by substantial evidence and not arbitrary or capricious. *Interstate Commerce Commission* v. *Illinois Central R. R.,* 215 U. S. 452, 470; *Virginian Ry.* v. *United States,* 272 U. S. 658, 665; *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286–287; *Shields* v. *Utah-Idaho Central R. R. Co.,* 305 U. S. —, —. The authority of the Commission pursuant to Sections 403 and 404 of the Communications Act brings the determination of the Commission in this case within the rule laid down by this Court in *Shields* v. *Utah-Idaho Central R. R. Co.*

ARGUMENT

I

THE COURT BELOW WAS WITHOUT JURISDICTION TO REVIEW THE DETERMINATION OF THE COMMISSION

This suit was heard by a statutory three-judge district court. The jurisdiction of such a court to review orders of the Federal Communications Commission is derived primarily from section 402 (a) of the Communications Act of 1934 which provides in part:

> The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act * * * and such suits are hereby authorized to be brought as provided in that Act.

The effect of the foregoing provision is to make applicable the provisions of the Urgent Deficiencies Act of October 22, 1913, to suits brought for the purpose of reviewing orders of the Federal Communications Commission. In view of recent decisions of this Court appellees submit that the order involved in the instant case is not one which may be reviewed by a court of three judges convened pursuant to the Urgent Deficiencies Act. *United States* v. *Griffin et al.*, 303 U. S. 226; *Shannahan et al.* v. *United States*, 303 U. S. 596; *Federal*

Power Commission v. *Metropolitan Edison Co. et al.*, 304 U. S. 375.[1]

In its Jurisdictional Statement to this Court appellant sets forth the following order which it asserts is the subject of review:

> Pursuant to the Report of the Commission issued by the Telephone Division herein, it is hereby ordered that the Rochester Telephone Corporation, as a wire telephone carrier, be, and the same is hereby, classified as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000.

In its brief appellant again sets forth the same order and states that it is this determination of the Commission which it seeks to have reviewed (Appellant's Brief, p. 3).

It is true that the record contains certain general orders of the Telephone Division of the Com-

[1] Objection to the jurisdiction of the court was not made below. Neither was any statement opposing jurisdiction filed with this Court. It appears, however, that the limited jurisdiction of a statutory three-judge district court cannot be waived or enlarged by the consent of the parties. See *Stratton* v. *St. Louis Southwestern R. R. Co.*, 282 U. S. 10, 18; *United States* v. *Corrick*, 298 U. S. 435, 440. This Court may raise the question of the lower court's jurisdiction of the subject matter on its own motion. *Stratton* v. *St. Louis Southwestern R. R. Co.*, 282 U. S. 10, 13; and see *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62–63; *Thomas* v. *Board of Trustees*, 195 U. S. 207, 211; *Mitchell* v. *Maurer*, 293 U. S. 237, 244.

mission designated as orders 1, 2, 3, 5, 6a, and 9 which require wire telephone carriers classified as the Commission has classified appellant to submit detailed information regarding their organization and operations. Broadly interpreted, the bill of complaint might be construed as attacking those general orders. The appellant did not, however, urge the court below to set aside the general orders as improper or unlawful exercises of administrative discretion, nor did the appellant introduce, either before the Commission or in the court below, any evidence relating to the validity of the general orders. It appears from the Jurisdictional Statement and from the arguments urged by the appellant both here and below that appellant's quarrel is not with the general orders but with the Commission's determination that appellant is subject to its jurisdiction. Appellant seems to concede at least by implication that if it is subject to the Commission's jurisdiction and to the general orders, those orders are proper and lawful exercises of administrative judgment.

The order which this Court is asked to consider has two aspects; *First,* it classifies appellant as a wire telephone carrier subject to certain provisions of the Communications Act of 1934, and, *second,* it notifies appellant that it is subject to all orders of the Telephone Division applicable to wire telephone carriers, whose gross annual operating income exceeds $50,000 (R. 430). If the second portion of the order has any significance it merely

serves to notify appellant that it is classed as subject to the general orders. "The decision neither commands nor directs anything to be done" (*Shannahan et al.* v. *United States*, 303 U. S. 596, 599). "It was merely preparation for possible action in some proceeding which may be instituted in the future" (*United States* v. *Los Angeles & S. L. R. R.*, 273 U. S. 299, 310).

This Court has held on many occasions that a determination which does not require a party to do or to refrain from doing anything is not such an order as is reviewable under the terms of the Urgent Deficiencies Act. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp*, 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412; 414; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482–483; *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469, 475–477; *Standard Oil Co.* v. *United States*, 283 U. S. 235, 238; *United States* v. *Corrick*, 298 U. S. 435, 438; *Shannahan et al.* v. *United States*, *supra*.

One of the reasons assigned by this Court which prevents the review of negative orders is the correlation of the provisions of the Urgent Deficiencies Act regarding suits brought to enforce orders of the Commission and those brought to set aside such orders. It was held in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, that district courts possessing jurisdiction to set aside or annul orders of the Commission were limited to reviewing orders

which the Commission could enforce under the terms of the Urgent Deficiencies Act. Applying that test to the present controversy, it is apparent that the Federal Communications Commission could not institute a proceeding to enforce the specific order classifying appellant as a wire telephone carrier subject to its jurisdiction. To require the submission of information which the Commission designated in the general orders previously mentioned, it would be necessary for the Commission to base its enforcement suit upon those general orders rather than upon the specific order of classification.

In this respect we are unable to perceive any valid distinction between the order of the Commission involved in this controversy and the order of the Interstate Commerce Commission which this Court held in *Shannahan et al.* v. *United States*, 303 U. S. 596, to be nonreviewable under the terms of the Urgent Deficiencies Act. In the latter case the Interstate Commerce Commission issued an order finding that a certain railroad was not within the terms of the exemption provision of the Railway Labor Act and was "therefore subject to the provisions of that Act" (303 U. S. 596 at 598). The fact that the order involved in *Shannahan et al.* v. *United States, supra*, determined that the railroad carrier was subject to the provisions of the Railway Labor Act and that the order involved in this case determined that the telephone carrier

was subject to all general orders of the Telephone Division of the Commission is immaterial insofar as the jurisdiction of the court below is concerned. In neither case is the party in question ordered to do or refrain from doing anything. Consequently it would be impossible for a court to command obedience to the order because there is nothing required which can be obeyed or disobeyed. If in the instant case appellant is under any compulsion, that compulsion flows from the provisions of the statute and from the general orders which appellant does not seek to have reviewed. Since the order here involved is not enforceable it is not subject to review under the provisions of the Urgent Deficiencies Act.

Another reason assigned by this Court for its refusal to permit the review of so-called "negative orders" is that the validity of the order which is challenged does not constitute the basis of the actual controversy. The decision of this Court in *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412, clearly demonstrates this situation. The Panama Canal Act prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water where the railroad might compete with the water carrier; prescribed a heavy penalty for any violation of the prohibition; conferred upon the Commission jurisdiction to determine the possibility of competition; and authorized the Commission to grant an extension of time to make

the necessary adjustments if it found a possibility of competition. The Lehigh Valley Railroad filed with the Commission a petition for a hearing on the question whether the services of a steamboat line owned by it would be in violation of the Act and for an extension of time. The Commission held that the Railroad competed with its boat line and dismissed the petition. This Court held that the risk to which the Railroad was subjected in continuing operation did not come from the order of the Commission which the carrier sought to review but from the statute which contained the prohibition and provided a penalty. It was therefore concluded that the determination of the Interstate Commerce Commission was not reviewable under the terms of the Urgent Deficiencies Act.

The same reasoning is applicable to the instant case. Although appellant seeks to determine the validity of the specific order classifying it as a wire telephone carrier subject to the Act, the actual controversy centers around the desire of appellant to be relieved of the duty to supply certain specified information which is imposed by the general orders of the Telephone Division of the Commission. The only penalties which appellant fears or is subject to are those imposed for failure to comply with the general orders. In short, the risk to which appellant is subjected arises from the Act and from the general orders which, as has been pointed out, are not under attack in this proceeding.

A practical application of this proposition to the instant case is readily apparent. If it be assumed for the purpose of argument only, that the decree below becomes final and thereafter appellant refuses to furnish the specified information, appellant would not be guilty of violating the decree of the court below because that decree only requires appellant to obey the order classifying it as a wire telephone carrier subject to the general orders. In order to compel appellant to furnish the information, it would be necessary for the Commission to resort to enforcement proceedings based upon the general orders. Similarly, if this Court should do nothing more than set aside the decree of the court below, the Commission would still be entitled to seek enforcement of its general orders by injunction under Section 401 of the Act upon the development of a new record establishing the control of appellant by the New York Telephone Company.

In its brief appellant contends that the Commission had no power or jurisdiction to determine the issue of exemption (Appellant's Brief, p. 17). We submit that there is no merit in this contention (see, *infra*, pp. 60–65). However assuming, *arguendo*, that appellant is correct in this contention, the decision of this Court in *Piedmont Northern Ry.* v. *United States*, 280 U. S. 469, is directly in point. In that case the Railway, considering itself not subject to the provisions of the Interstate Commerce Act, decided to extend its lines to connect with

several steam railroads. At the suggestion of the Commission, the Railway filed an application for a certificate of public convenience and necessity as required of carriers subject to the Act. The Commission took jurisdiction and denied the application after a hearing. The Railway brought suit under the Urgent Deficiencies Act insisting that it was exempt from the jurisdiction of the Commission and that the order should be set aside for that reason. In answer to this contention of the Railway, this Court said (p. 477):

> The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute. If the statute gives the Commission jurisdiction over the Railway's application, then concededly the order is not subject to attack. *If, on the other hand, the statute does not confer the jurisdiction, then obviously the order is no obstacle to the Railway's plans.* What plaintiffs [sic] are seeking is, therefore, in substance, a declaratory judgment that the Railway is within the exemption contained in paragraph 22 of the Act. Such a remedy is not within either the statutory or the equity jurisdiction of federal courts. [Italics supplied.]

The appellees submit that under the decisions of this Court the order involved in this litigation is not one which may be enjoined, set aside, or annulled by a statutory three-judge court convened pursuant to the Urgent Deficiencies Act.

II

THE FEDERAL COMMUNICATIONS COMMISSION PROPERLY INTERPRETED THE EXEMPTION PROVISION OF SECTION 2 (b) (2) OF THE ACT

Section 2 (a) of the Communications Act of 1934 provides that all carriers engaged in interstate and foreign communication by wire or radio shall be subject to the provisions of the Act. Section 2 (b) (2) exempts such carriers from the jurisdiction of the Commission if they are engaged in such interstate and foreign communication "solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled" by such carrier. Appellant conceded in the court below that it was engaged in interstate and foreign communication by wire solely through physical connection with the facilities of the New York Telephone Company, and that the latter company is a carrier subject to the jurisdiction of the Commission (R. 1). Appellant denies that it is either directly or indirectly controlled by the New York Telephone Company and asserts that it therefore falls within the terms of the exemption clause of Section 2 (b) (2) of the Act.

The Commission, after extended hearings and after careful analysis of the statutory language, concluded that the appellant is controlled by the New York Telephone Company. The court below not only decided that the Commission's determination was supported by substantial evidence but in

its findings of fact and conclusions of law the court in effect adopted the Commission's finding as its own.[2]

In rejecting the appellant's contentions, both the Commission and the court below took the view that a carrier was subject to control within the meaning of Section 2 (b) (2) if there existed a power to exert such control and that it was not necessary to show concrete instances of the exertion of that control in order to deny a carrier the benefits of the exemption clause. The appellees submit that this construction of the statute is correct.

It is a well established principle of statutory construction that provisos and exemptions, being intended to exclude something which otherwise would be within the scope of the general language of the enacting clause, must be strictly construed and limited to the objects fairly within their terms. *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U. S. 1, 10. In order to construe the language of Section 2 (b) (2) it is necessary to examine and understand the meaning of the term "control" as used by Congress in the exemption clause. A guide to the meaning of the term "control" is furnished by the context of the Act as a whole and by the relation of the specific provision here in question to the broad communications policy laid down by Congress. According to the provisions of Section 1 of the Act, Congress under-

[2] See Paragraph XIX of the Findings of Fact (R. 446) and Paragraph VI of the Conclusions of Law (R. 448).

took "to make available to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *" When the phrase under consideration is read in the light of this congressional policy it is clear that Congress intended that the word "control," as used in the exemption section, should be given a broad significance and that its scope should not be limited by any narrow and technical construction.

A consideration of the legislative history of the statute shows that the Commission and the court below have interpreted the exemption clause of Section 2 (b) (2) so as to give proper effect not only to the language used but also to the intention of Congress in the use of the term "control."[3] The

[3] When the meaning of legislation is doubtful or obscure, to ascertain the true intent of the legislature, resort may be had to reports of congressional committees which have considered the measure (*McLean* v. *United States*, 226 U. S. 374, 380; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278). It has also been held by this Court that reference to expositions concerning the bill on the floor of Congress by those in charge of or sponsoring the legislation is permissible. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 475; *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 536; *Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke et al.*, 300 U. S. 440, 463. In situations similar to the one before this Court it has been held that resort may be had to the congressional debates in order to show common agreement as to the purpose of the statute. *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625.

congressional reports prior to the passage of the Communications Act of 1934 make it abundantly clear that the exemption clause referring to wire carriers "not directly or indirectly controlled by" a connecting carrier was purposely not defined in order that the Commission would not be unduly hampered in its administration of the Act. A reference to the legislative antecedents of the Communications Act of 1934, a method of interpretation which was permitted by this Court in *United States* v. *Pfitsch*, 256 U. S. 547, 551, and *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 155, clearly sustains this position.

Both H. R. 8301 and S. 2910 (73rd Cong., 2d Sess.), the legislative antecedents of the Communications Act of 1934 in the House and Senate, respectively, contained a section in which the terms "parent," "subsidiary," and "affiliate" were defined. By this device the original bills attempted to segregate by definition the particular communication companies which were to come within the purview of the Act. These definitions were as follows:

> SEC. 3 (j). "Parent" means any person or group of persons controlling one or more corporations and/or the operations or management thereof, whether by ownership or control of stock, or by interlocking directorates, or otherwise. The ownership or control by any such person or group of persons of 15 per centum or more of the stock of any corporation shall be prima

facie evidence of the control of such corporation and/or its operations or management by such person or group be deemed to be a "parent." A corporation to which any such person or group of persons bears the relationship of parent shall be deemed to be a "subsidiary" of such person or group of persons.

(k) Two or more persons shall be deemed to be affiliated if they are members of a group, composed of a parent and its subsidiary or subsidiaries, or a parent, its subsidiary or subsidiaries, and other corporations, of which each member except the parent is a subsidiary of some other member.[4]

During the hearings on these bills it was pointed out by several witnesses that considerable confusion would result from the use of such terms as "parent," "subsidiary," "affiliate" and that therefore they should either be eliminated from the bills or less controversial terms should be used in their place.[5] After consideration of these objections, the terms "parent," "subsidiary," "affiliate" were completely eliminated from both bills. One of the principal reasons for this change is explained in the Report of the Committee on Interstate and Foreign Commerce of the House of Rep-

[4] Hearings before the Committee on Interstate Commerce, U. S. Senate, 73d Cong., 2d Sess., on S. 2910, p. 2.

[5] *Ibid.*, pages 96, 139; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong., 2nd Sess., on H. R. 8301, pages 240–241.

resentatives. That report pointed out that the specified standard of 15 per cent stock ownership in a corporation might be inadequate as a measure of effective control. In place of this standard the Committee inserted the exemption clause which the Commission has construed in this case. The full explanation of this amendment to the original bills is contained in the Report of the House Committee in the following language:

> The bill upon which this committee held hearings (H. R. 8301), contained a definition of the terms "parent," "subsidiary," and "affiliated" for the purposes of those provisions of the bill which applied to parents and subsidiaries of common carriers subject to the act and persons affiliated with such carriers. The Senate bill and the amendment reported herewith both leave out these definitions since the persons intended to be covered are referred to in the Senate bill and the amendment as persons "directly or indirectly controlling or controlled by, or under direct or indirect common control with" any carrier subject to the act. It is believed that this method of referring to such persons is preferable to attempting to cover them through the use of the terms "parent," "subsidiary," and "affiliated." Many difficulties are involved in attempting to define such terms. It is believed that a more satisfactory result will be reached by referring to such persons as in the Senate bill and amendment. *No attempt is made to define "con-*

> *trol," since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control.* It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, leasing, contract, and agency. It is well known that actual control may be exerted through ownership of a small percentage of the voting stock of a corporation, either by the ownership of such stock alone or through such ownership in combination with other factors. [Italics supplied.][4]

In view of this legislative history, it is submitted that there are three factors which should be considered in construing the exemption clause as applied to the appellant. First, Congress did not feel that the fifteen per cent stock-ownership standard was a sufficient criterion by which to measure the element of corporate control. Second, Congress did not intend to expressly define the word "control" as used in the exemption clause since to do so would be to "limit the meaning of the term in an unfortunate manner." It is evident that Congress properly avoided detailed rules and definitions in order to give the Commission a limited discretion as to those companies which should come within the purview

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[4] House Report 1850, 73rd Cong., 2nd Sess., pp. 4–5.

of the Act. Third. Congress intended to include within the meaning of the term "control" both "actual control as well as what has been called legally enforceable control."

It is a reasonable implication from the foregoing analysis that Congress intended to leave the definition and application of the term "control" to the *sound discretion of the Commission according to the particular facts and circumstances as disclosed in each case coming before that body in which the issue was raised.* For this reason, if for no other, appellees contend that the previous administrative or judicial interpretation of similar terms in other congressional acts having no relation to the Communications Act should not be permitted to alter or modify the apparent intention of Congress in the construction of the latter Act. In its brief (pp. 25–26) appellant cites several decisions of the Interstate Commerce Commission interpreting the term "control" as used in Section 5 (2) of the Transportation Act of 1920 and numerous decisions of this Court and the lower courts construing the concept of corporate control with respect to various legal questions. It is submitted that the earlier construction of these acts by either administrative bodies or the courts should not be conclusive as to the intention of Congress when the term was used in a subsequent Act having no relation to the previous legislative policies.

In the House Report previously mentioned, the Committee referred to the railroad provisions of

the Interstate Commerce Act and to the fact that an attempt had "been made to preserve the value of court and commission interpretation of the Act, *but at the same time modifying the provisions so as to provide adequately for the regulation of communications' carriers.*"[7] This observation is of particular significance when it is realized that the Committee, during its consideration of H. R. 8301, had before it the Splawn Report on Communication Companies.[8] The Splawn Report was emphatic in its conclusions as to the inadequacy of the existing provisions of the Interstate Commerce Act to control or regulate the holding company situation and was likewise emphatic in its warning that "A bill regulating communications in interstate commerce will fall far short of being effective unless it first restrict the use of the holding company to what is absolutely essential and necessary and second unless the regulation is extended to the holding company in like manner as to the operating company."[9] It was doubtless in part because of this observation regarding holding companies that the Communications Act restricted the exemption clause to intrastate carriers *not* controlling or controlled by connecting wire carriers. It may also be assumed that it was for similar reasons that the definition and application of the term "control" to

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[7] House Report 1850, 73rd Cong., 2nd Sess., p. 4 (Italics supplied).

[8] House Report 1273, 73rd Cong., 2nd Sess.

[9] House Report 1273, 73rd Cong., 2nd Sess., pp. xxx, xxx.

particular companies was left to the sound discretion of the Commission.

Appellant contended in the court below that the controlling company must not only have the power to control but must also affirmatively exercise that power in acts of dictation and direction of the company's affairs. In opposition to this contention, appellees relied upon the Report of the House Committee which has been quoted above (p. 25, *supra*) and which indicates that Congress intended "to include actual as well as what has been called *legally enforceable control.*"[19] Nowhere throughout the entire House Report is there any indication that the power to control, that is, legally enforceable control, is not sufficient in itself to come within the term "control" as used in Section 2 (b) (2).

Furthermore, there is no evidence whatsoever that Congress intended to exclude carriers from the jurisdiction of the Commission which were admittedly under a legally enforceable control but not actually controlled at any particular time when an investigation was being conducted. Any other interpretation of Section 2 (b) (2) would create grave problems in the administration of the exemption clause. Each intrastate carrier engaging in interstate communication through connecting facilities of a controlled or controlling carrier would have to be under constant investigation by

[19] House Report 1850, 73rd Cong., 2nd Sess., pp. 4-5. [Italics supplied.]

the Commission in order to ascertain if the power to control was being affirmatively exercised by either carrier.[11] Even assuming that such constant investigation were practicable, in many instances the situation would change before or even after the Commission had attempted to exercise its jurisdiction over such carriers. Such an interpretation of the Communications Act would run counter to the manifest intent of Congress.

The House Report previously referred to assumes without question that the bare existence of a legally enforceable control or the power to control would be sufficient to come within the meaning of the statutory language. In addition to this, Con-

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[11] *Cf.* Bonbright & Means, *The Holding Company* (1932) 8:

"Most legal writers, for example, would give the name 'holding company' only to a company which actually exercises control of one or more other companies. A minority of writers, however, would make the ability to control, rather than its actual exercise, the deciding factor. Having in mind the practical necessities of legal drafting, we prefer this second form of definition. It is much easier for an administrative or judicial body to determine when a company has the ability to control another company than to determine when it is actually making use of its power. Often, moreover, a company which possesses the power to control another company will refrain from exercising it for a considerable period of time, and will bring it into play only when some special occasion demands its use. In a case like this the mere existence of the power to control, even if it is being held in abeyance is a matter of public interest, and may be sufficient to justify whatever supervision may properly be imposed upon an active holding company."

gress intended the general concept of control to include actual control, either directly or indirectly, by any means or device whatsoever. This affirmative exercise of control which Congress considered to be a possible element of the general concept of control should be considered as *a separate and distinct factor* evidencing a degree of control rather than *an essential or necessary attribute* of the term as used by Congress in the exemption clause.

One other point in this connection should be emphasized. When Congress included actual as well as legally enforceable control within the concept of the term "control" it did so in full recognition of the fact that there were "many ways in which actual control may be exerted" such as "stock ownership, leasing, contract, and agency." Congress was also aware that such control could be exerted "through ownership of a small percentage of the voting stock of a corporation either by ownership of such stock alone or through such ownership in combination with other factors."[12] Appellant has apparently ignored these possibilities of actual control by constantly referring to "the actual power to select the board of directors (or its majority)," as the sole criterion of corporate control (Appellant's Brief, pp. 21, 34). To insist upon this criterion to the exclusion of all others is to ignore the realities of financial and corporate

[12] House Report 1850, 73rd Cong., 2nd Sess., p. 5.
[13] *Ibid.*

practices. Congress intended the term "control" to embrace *every form of control*, actual or legal, direct or indirect, negative or affirmative, and to include also the power to control regardless of whether that power was being affirmatively exercised at a particular time when the issue is raised before the administrative body."[14]

In its brief (pp. 26–27) appellant intimates that both the Commission and the court below relied on the fact "that there is a possibility that New York Telephone Company may some time control appellant." This is a circumstance which the Commission and the court below might properly take into consideration in reaching a conclusion, but appellant errs if it assumes that this was the sole basis of the Commission's determination or

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[14] In a recent case before this Court, Mr. Justice Stone took occasion to consider the various forms by which corporate control may be exercised. In delivering the opinion of the Court in *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 307, 308, it was said:

"We have not said, nor do we perceive any ground for saying, that the constitution requires such an inquiry to be limited to those cases where common control of two corporations is secured through ownership of a majority of their voting stock. We are not unaware that, * * * *there are other methods of control of a corporation than through such ownership. Common management of corporations through officers and directors, or common ownership of a substantial amount, though less than a majority of their stock*, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry." [Italics supplied.]

the District Court's decision, or that either the Commission or the court below confused the possibility of control with legal power to control. Both the Commission and the court below did more than conclude that there is a possibility that the New York Telephone Company might at some time in the future control appellant; both concluded that there exists at the present time a legal power on the part of the New York Telephone Company to control the appellant and that as a result the appellant falls outside of the terms of Section 2 (b) (2).

III

THE APPELLANT IS CONTROLLED BY THE NEW YORK TELEPHONE COMPANY WITHIN THE MEANING OF SECTION 2 (b) (2) OF THE ACT

A. APPELLANT'S CORPORATE STRUCTURE CONFERS LEGAL POWER TO CONTROL UPON THE NEW YORK TELEPHONE COMPANY

The appellant, a New York corporation, is capitalized at $12,000,000 divided into 120,000 shares of capital stock, each with a par value of $100 (Ex. 10, R. 55, 351–364; Ex. 15, R. 62, 376–384). Of the 120,000 shares of capital stock authorized, 71,966 shares with a total par value of $7,196,600 have been issued and are now outstanding (Ex. 16, R. 117, 394). The shares of stock now issued and outstanding are classified and held as follows (Ex. 16, R. 117, 394):

1,000 shares of common stock ($100,000 total par value), of which 665 shares are de-

posited under a voting trust agreement, and 335 shares are owned outright by the New York Telephone Company.

22,826 shares of first preferred stock ($2,282,600 total par value), which are owned by the general public.

48,140 shares of second preferred stock ($4,814,000 total par value), all of which is owned by the New York Telephone Company.

In addition to this stock the appellant has issued bonds with a face value of $6,238,000 which are largely held by the public (R. 68).

The first preferred stock has no voting rights whatsoever. The voting rights of the shareholders are concentrated in the hands of those who own the common and the second preferred stock. The usual majority voting power of the common stock is expressly limited by the certificate of incorporation, which provides that no vote or consent of the stockholders upon any question of consolidation, lease, sale, or conveyance of any of the property, rights, privileges, or franchises of the corporation, made otherwise than in the ordinary course and conduct of its business; or of the increase or reduction of the capital stock of the corporation; or of the guaranteeing of bonds of any other corporation; or the alteration or amendment of the certificate of incorporation, shall "become effective for any purpose whatsoever unless concurred in by the affirmative vote or consent of at least eighty (80)

per cent of the then issued and outstanding common stock of the corporation" (Ex. 10, R. 55, 351–364). The certificate of incorporation provides that the holders of the second preferred stock "shall have equal voting power with the common stock, except that they shall be without power to vote at any meetings of the stockholders of the corporation held for the purpose of electing directors or for the adoption or amendment of the By-Laws of the corporation, unless and until any time after the close of the second fiscal year . . . the corporation has failed (in which event it shall forthwith come into full voting power) to pay out of earnings dividends upon all of the issued and outstanding preferred stock at the rate provided to be cumulative as aforesaid" (Ex. 10, R. 55, 351–364). The second preferred stock is not redeemable, but the first preferred stock may be redeemed on any dividend payment date at par plus a premium of 10 per cent plus all unpaid cumulative dividends (*Ibid.*).

The appellant's entire case rests ultimately upon the assertion that 665 of the 1,000 issued and outstanding shares of appellant's common stock are deposited under a voting trust agreement and that all rights and privileges pertaining to those shares are held and exercised by three voting trustees who are "in no way connected or affiliated with the New York Telephone Company" (Appellant's Brief, p. 21). Appellees cannot accept this description of the voting trust, nor do they admit

that its effect is to prevent control by the New York company.[15] But even if appellant's characterization of the voting trust is accepted at face value, the conclusion based theron is unsound. Irrespective of the voting trust, the ownership of one-third of appellant's common stock and of all of its second preferred stock confers upon the New York company a degree of control which falls within the scope of Section 2 (b) (2).

This conclusion follows from two circumstances: First, by reason of its ownership of all of the second preferred stock and one-third of the common stock, the New York Telephone Company can in many major matters exercise voting control far in excess of that possessed by the stock deposited in the voting trust. Merely by virtue of its ownership of the second preferred stock the New York Telephone Company has equal voting rights with the common stockholders on all matters except two—the election of directors and amendments to the By-Laws. As to all corporate matters except these, the power of the New York Telephone Company to control is absolute and unqualified. In the second place, by reason of its ownership of one-third of the common stock and the requirement that 80 per cent of the common stockholders assent in many matters, the New York Telephone Company exercises an additional power of control over the appellant in the nature of a veto power. It is sub-

[15] This point is discussed infra pages 47 to 53.

mitted that these elements of control are substantial and cannot be minimized by reference to the degree in which they may affect the ordinary operations of appellant.

The substance of the claim of appellant both before the Commission and in the court below is that the control of the Rochester Telephone Corporation, which has more than thirteen and one-quarter million dollars in securities outstanding, is vested in the majority of the common stock which represents an investment of only $66,550. And this claim is urged despite the fact that the New York Telephone Company has an investment in the corporation amounting to $4,847,500 in common and preferred stock and actually owns and controls in its own name *97 per cent of the stock of appellant which concededly has present voting privileges* with respect to many important corporate matters (R. 394–395).[16]

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[16] In its brief (p. 38) appellant charges that the determination of the Commission in this case is inconsistent with its previous decision in *In the Matter of Jamestown Telephone Corporation*, 4 F. C. C. 326 (1937). The entire record upon which the Commission acted in the *Jamestown* case is not before this Court. The Commission's report indicates, however, that in at least two respects the situation there under consideration differed radically from the case at bar (4 F. C. C. 337, 338–339): (1) No part of the capital investment made by any of the local independent stockholders was supplied directly or indirectly by the New York Telephone Company; (2) There was affirmative evidence establishing not only independence on the part of the Jamestown Telephone Corporation but active conflict, including *litigation*,

Appellant devotes a considerable portion of its brief (pp. 22–26) to the citation of decisions and textbook writers to the effect that "The ultimate source of corporate control * * * is vested in stockholders having a majority of the voting stock." Assuming, for the purpose of argument only, that this statement is correct, it does not materially assist appellant. The voting power of the shareholders of the Rochester Telephone Corporation is vested in the owners of both the common and the second preferred stock, of which the New York Telephone Company owns approximately 97 per cent—33½ per cent of the common stock, and 100 per cent of the second preferred stock. The fact that there are certain corporate matters with respect to which the second preferred shareholders are not entitled to vote does not warrant the assumption of appellant that the sole test of control must be found in the distribution of the common stock (Appellant's Brief, p. 21). In any view of the matter, the Commission was clearly justified in considering the ownership of the second preferred stock in its attempt to ascertain whether appellant was controlled by the New York Tele-

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between it and the New York Telephone Company. Furthermore, if such an inconsistency does exist it has no bearing on the present case. *Cf. Virginian Ry.* v. *United States*, 272 U. S. 658, 663, where this Court said with respect to an order of the Interstate Commerce Commission: "This Court has no concern * * * with the alleged inconsistency with findings made in other proceedings before it [the Interstate Commerce Commission]."

phone Company. There is no merit in the contention that in determining the issue of control ownership of the majority of a certain class of stock may be disregarded merely because the voting rights of the stock are not absolute and unqualified. This the appellant itself implicitly concedes. The appellant insists in effect that the corporation is controlled by the 665 shares of common stock which are deposited under the voting trust agreement. It should be noted that the voting rights of this stock are not absolute and unqualified because on any major corporate matters action can be taken only if approved by 80 per cent of the issued and outstanding common stock.

It was claimed by appellant before the Commission that it is not likely that any occasion requiring the 80 per cent vote or consent of the common stockholders will arise in the near future, although it was admitted that such consent had been necessary on at least one occasion in the past (R. 110). In its brief (pp. 28–29) appellant also contends that even though approximately one-third of the common stock and all of the second preferred stock is held by the New York Telephone Company, it is not in fact vested with power to control because neither the voting trustees, who control two-thirds of the common stock, nor the New York Telephone Company can at any time exercise an 80 per cent vote of the common stock without the aid or consent of the other. From this appellant concludes that such power of control as the New York Telephone Com-

pany may possess is at best a negative or veto power which is equally possessed by both parties and enables either to block the other on any major question which may arise. Under these circumstances, it is argued that the New York Telephone Company has no such control over the affairs of appellant as was contemplated by Congress in the exemption provisions of Section 2 (b) (2) of the Act. It is submitted that the argument of the appellees in this brief concerning the broad construction which should be given to the term "control" completely disposes of the contention of appellant in that regard. The power to check and obstruct affirmative action by a corporation is as real and substantial as the power to exercise an affirmative right of action. It may be true that when large blocks of stock are wide-spread among shareholders, the veto power is not necessarily a means of locating corporate control. But where the voting shares are divided between two entities the veto power must necessarily be considered in any attempt to locate the source of control.

The affairs of appellant are governed by a Board of Directors, consisting of fifteen men, ten of whom are named by the voting trustees and five by the New York Telephone Company (R. 63). Of the ten directors elected by the voting trustees only one owns any common stock (R. 148). The policies of appellant are governed by an Executive Committee consisting of five directors, three of whom are

named by the voting trustees and two by the New York Telephone Company (R. 66). Provision is made in appellant's articles of incorporation for cumulative voting in the election of directors and executive committee members to insure the New York Telephone Company's representation in the ratio as above stated (R. 354; Ex. No. 10). This arrangement is not calculated to impair the power of the New York Telephone Company to control the appellant. The influence and domination which a group interest may exercise through the election of a minority of the members of a board of directors cannot be measured by reference to mere numbers. Cf. *Globe Woolen Co.* v. *Utica Gas & Electric Co.*, 224 N. Y. 483, 489; 121 N. E. 378, 379–380 (1918). A compact minority, acting as a unit on behalf of a definite interest, may well exercise an influence disproportionate to its ~~members~~ nominees. As long as the New York Telephone Company is entitled to elect five members of the board of directors of appellant it cannot be said with any assurance that the voting trust agreement serves to insulate appellant from the control of the New York Company. This is not to suggest that the New York Telephone Company has exerted or is exerting an improper influence on the management of appellant. On the other hand, appellees submit that it is desirable to avoid an analysis which attaches too much significance to the voting trust agreement and not enough importance to the

existence of a predominant power to control the major affairs of appellant.

Another point worthy of mention is the previous background of the man who was selected to be the general manager of appellant when it was originally organized and who is now its president. John P. Boylan was the first general manager of appellant and came to that company from the Mountain Home Telephone Company, which was admittedly controlled by the New York Telephone Company (R. 137). He continued in the position of vice-president and general manager of appellant until the death of Mr. Fuller, at which time he was made president and a member of the board of directors. Although Boylan was appointed one of the trustees of the voting trust agreement, he does not own a single share of stock which has any voting rights and only 20 shares of the first preferred stock. Appellant states in its brief (p. 43) that any inference which may be drawn from these facts with respect to the issue of control is too weak to warrant consideration. But appellant makes no comment on the testimony of Boylan contained in the record before the Commission, to the effect that the Mountain Home Telephone Company "had pretty much the same setup as we have now in the Rochester Telephone Corporation * * *" (R. 137). The Commission considered this testimony to be revealing, particularly when it is realized that the Mountain Home Telephone Company was concededly

controlled by the New York Telephone Company through a majority stock ownership although the Bell had only two directors out of fifteen on the Board (R. 137).

B. AN EXAMINATION OF THE HISTORY OF APPELLANT AND OF THE VOTING TRUST SUPPORTS THE COMMISSION'S CONCLUSION THAT APPELLANT IS CONTROLLED BY THE NEW YORK TELEPHONE COMPANY

1. The history of appellant

The Rochester Telephone Company (corporate predecessor of appellant) was organized in 1899 as an independent company in the territory of Rochester, New York (R. 35). For some time after its creation, the company was reasonably successful in its operation but by the year 1909 it had become increasingly evident that the company was not going to be a financial success (R. 35). Competition between the independent telephone companies and the American Telephone and Telegraph Company, the parent company of the New York Telephone Company, was very active in Western New York State during the period from 1904 to 1911 and thereafter (R. 303). This competitive situation caused a period of abnormal expansion of telephone service, with the result that both the American Telephone and Telegraph System and the independent companies were forced to make large expenditures for duplicate equipment and service (R. 303). The tendency of the public was to patronize the company with the larger

number of subscribers with the result that in some localities the predominant exchange was the Bell System and in others an independent company (R. 303). In Western New York State, as in many other sections of the country, this situation naturally led to isolation of the district served by one company from those served by other companies (R. 303).

As a result of this competitive situation in the Rochester district, the Rochester Telephone Company and the New York Telephone Company made arrangements to merge in one company the properties which they owned in the Rochester territory. A pre-organization agreement dated February 25, 1938, was executed by and between George R. Fuller, W. Roy McCanne, and Frederick W. Zoller, all officers of the Rochester Telephone Company, as individuals, the Rochester Telephone Company, and the New York Telephone Company, in which it was agreed that a new corporation, to be known as the Rochester Telephone Corporation, was to be formed to acquire all the property of the Rochester Telephone Company and the New York Telephone Company in the City of Rochester and territory adjacent thereto (R. 307–328; 329–334).[17] In accordance with this agreement, the New York Telephone

[17] Supplemental agreements were entered into March 1, 1920, and May 1. 1921, between the same parties changing certain unimportant details of this arrangement (R. 334–341).

Company agreed, under certain definite conditions, to provide all the money required for the purchase of the various properties, both of the New York Company and the Rochester Company, and for the payment of all expenses incurred in the consummation of the entire transaction (R. 49; 307–328; 329–334; 334–41). A supplemental agreement, also dated February 25, 1918, between Messrs. Fuller, McCanne, and Zoller and the New York Telephone Company provided for the payment of a fixed sum to Messrs. Fuller, McCanne, and Zoller as compensation for the performance of certain specified services which it was stated in the contract were to be performed in connection with the organization of the appellant (Ex. 5, R. 49, 329–334).

Among other things, the supplemental agreement required Fuller, McCanne, and Zoller:

1. To secure a preponderance of public sentiment in favor of the consolidations within the territories affected;

2. To obtain written consent of the Department of Justice to the consolidation of the Federal Telephone and Telegraph Company in Buffalo with the New York Telephone Company;

3. To use their best efforts to effect the sale and conveyance of all of the property of the Rochester Telephone Company to the new Rochester Telephone Corporation;

4. To incorporate the Rochester Telephone Corporation in accordance with the terms of the above mentioned agreements;

5. To secure approval of the Public Service Commission of New York as to certain schedules of rates already established in the agreement;

6. To purchase 665 shares of common stock out of a total of 1,000 authorized shares of the new corporation for cash at a par value of $100 per share and to subject such shares to a voting trust agreement;

7. To present to the New York Telephone Company satisfactory proof of the complete performance of all of the required services, in return for which the company would pay them the sum of $70,000, it being expressly stipulated that $66,500 of this amount was to be used by the individuals to purchase the above mentioned 665 shares of common stock (Ibid.; R. 48).

Appellant was incorporated February 14, 1920, for the purpose of acquiring and consolidating the properties of the New York Telephone Company in the Rochester territory and the Rochester Telephone Company (R. 55, 351–364; Ex. No. 10). The consolidation was affected by appellant's taking all the properties of both of these companies at an appraised valuation approved by the New York Public Service Commission, in accordance with the provisions of the pre-organization agreement (R. 42, 307–329; Ex. No. 4). The valuation of the Rochester Telephone Company was fixed at $1,600,000 subject to the bonded mortgage indebtedness of $1,058,000, which was paid with bonds issued by appellant for that purpose (R. 46–47). These bonds

have since been retired (Ibid.). The properties of the New York Telephone Company in the Rochester territory were valued at $4,814,000 and were paid for by appellant with preferred (now designated as second preferred) stock for the full amount at par value (R. 59–60). By its articles of incorporation, appellant was authorized to capitalize its investment for $7,000,000 and to issue 70,000 shares of stock with a par value of $100 each, consisting of 1,000 shares of common stock and 69,000 shares of 5% cumulative preferred stock (R. 55, 351–364; Ex. No. 10). In March 1926 appellant obtained authority to increase its capitalization to $12,000,000 and to issue 50,000 shares of 6–6½% cumulative preferred stock, each with a par value of $100 (R. 62, 376–385; Ex. No. 15). Under the certificate of authority this issue was classified as first preferred stock and the original preferred stock was reclassified as second preferred stock (Ibid.).

2. The history of the voting trust

The pre-organization agreements, which have been described at pages 44 to 46, *supra,* provided that the 665 shares of appellant's common stock purchased by Fuller, McCanne, and Zoller, with funds furnished by the New York Telephone Company, were to be immediately deposited and held in a voting trust, and that 335 shares of the common stock were to be issued to the New York Company.

These arrangements were carried out. On July 29, 1921, after the consolidation of the properties of these two companies, the 1,000 shares of common stock of appellant were issued as follows: to George R. Fuller, as trustee, 645 shares; to W. Roy McCanne, 10 shares; to Fred C. Goodwin, 10 shares; to Tage P. Sylvan, Vice-President of the New York Telephone Company and one of the incorporators of appellant, 10 shares; and to the New York Telephone Company 325 shares (R. 57, 371–373; Ex. No. 13).

It thus appears that the 665 shares of common stock, purchased with moneys provided by the New York Telephone Company were divided among Messrs. Fuller, McCanne, and Goodwin. It is to be noted that although paid to him for alleged services, the 645 shares of common stock were not issued to Fuller in his own name but merely as trustee (R. 375). For whom Fuller in the first instance was to hold this stock in trust is not definitely or satisfactorily disclosed by any of the testimony given at the hearing before the Commission.

Thereafter, on November 10, 1921, the stock certificates previously issued were cancelled, and a new certificate for 665 shares was issued to Fuller, Goodwin, and McCanne as voting trustees (R. 375). These persons became the first voting trustees and remained so until the time of the death of Fuller and McCanne (R. 97–98). Fuller died in 1926;

at that time the stock standing in his name as trustee passed to Goodwin and McCanne jointly, and J. Foster Warner was appointed a voting trustee in his place (R. 57, 371–373; Ex. No. 13). McCanne died in 1934 (R. 98), and thereafter John P. Boylan, President and general manager and director of appellant, was made voting trustee in his place (R. 57).

On November 10, 1921, when the 665 shares of stock were first placed under the voting trust, the following voting trust certificates were issued: One in the name of Fuller for 375 shares, one in the name of Goodwin for 280 shares, and one in the name of McCanne for 10 shares (R. 371). Goodwin testified that at the outset Fuller made him a present of the beneficial interest in certain shares of the common stock; that when Fuller died, McCanne and Goodwin purchased the balance of Fuller's beneficial interest; and that when McCanne died, Goodwin purchased McCanne's beneficial interest in the stock. After McCanne's death Goodwin became the beneficial owner of the entire 665 shares of stock held under the voting trust agreement (R. 97–98, 373).

Goodwin testified that he and his wife are now the owners of the voting trust certificates of all the common voting stock of appellant, except the 335 shares owned by the New York Telephone Company (R. 61, 373). The stock is still deposited in a voting trust under the agreement which expired on August 1, 1936, but Goodwin testified that the

agreement was to be reexecuted for another ten-year period with the same voting trustees, namely, Messrs. Goodwin, Boylan, and Warner (R. 59).

It is plain from the record that the limitation of the amount of common stock and the creation of the voting trust were arrangements designed to protect the interests of the New York Telephone Company. Goodwin's testimony on this point was quite explicit (R. 79, 81, 82):

> Q. Was there any discussion at all with reference to the amount of common stock to be issued, as to the desirability of permitting citizens of Rochester to participate, to purchase and hold some of that common stock?
>
> A. That was not feasible.
>
> Q. Why?
>
> A. Because the Bell Company would never, the New York Telephone Company, and very properly, would not put $5,000,000 of their property in the hands of a small group in the City of Rochester who knew nothing about the telephone business. It would have been suicide for them to do it.
>
> Q. Why?
>
> A. Because those men would not know anything about running a telephone business. *That is why this scheme was thought of, so that the Bell Company would know they were putting their properties in the hands of men that they believed were trustworthy and that they knew knew something about running the telephone business.*
>
> * * * * *

A. I have said the Bell Company was not willing—and I think they were perfectly reasonable and wise in it—*they were not willing to turn over about $5,000,000 worth of property represented by their preferred stock to a group of men, however organized, whom they did not know, whom they had no confidence in so far as their ability to run a telephone company was concerned.* Now, they had seen these men operate in Rochester, they knew they had done a fairly good job within their limitations, and they felt content, with a fair representation in the new company that those men should have their properties to operate.

* * * * *

Now, there is a very good reason why that common stock could not have been made $1,000,000 instead of $100,000 and, as you say, let the public in. You can only have a voting trust for 10 years. At that time you could only have it for five years in the State of New York. *At the end of that five-year period, as the picture then appeared, if we had put out that stock neither we nor the Bell, and God only knows who might control the company.* [Italics supplied.]

It is a fair inference that the voting trust was created to enable the New York Telephone Company to maintain some degree of influence and control over the 665 shares of common stock which it did not own. Goodwin's frank admission that the purpose of the arrangement was to insure that the appellant would be controlled by persons whom the

New York Company regarded as "trustworthy" indicates that it was assumed at the very least that a community of interest would exist between the voting trustees and the New York Company. Admittedly, this community of interest was not embodied in any legal device which permitted the New York Company legally to compel the voting trustees to any particular course of action. But the reality of the common interest and of the resulting control is not dependent upon external manifestation in a legal device. Its existence may better be tested by the willingness of the New York Telephone Company to invest approximately $4,800,000 in the stock of the appellant. As Goodwin points out in his testimony, which has been quoted above, in view of the size of the New York Company's investment, the retention of some degree of influence and control was to be expected; the failure to do so might well be regarded as lack of ordinary business prudence on the part of the New York Company. This is not to say that either the New York Company or the voting trustees were or have been guilty of any improper or illegal conduct. The appellees make no such charge. But the appellant's entire case rests upon the contention that the voting trust, of itself and apart from all other considerations, makes control by the New York Company impossible. The appellees submit that when the history and the purpose of the voting trust device is examined, that device fails to sustain the heavy burden which appellant's argu-

ment places upon it. Far from establishing appellant's independence, careful examination discloses the voting trust as merely another device of control—a device which operates with more subtlety and in a less tangible form than outright ownership of all of the common stock, but a device of control none the less.

The record before the Commission discloses that the predecessor, Rochester Telephone Company, had no other stock than common stock authorized or outstanding and that its ownership was widespread among the citizens of Rochester who were not particularly friendly to the New York Telephone Company and its parent corporation, the American Telephone and Telegraph Company (R. 74, 79). The record also indicates that five of the nine original incorporators of the appellant who subscribed to the common stock were prominent citizens of Rochester, but only three of them ever received any of this stock (R. 84). And of the present fifteen members of the Board of Directors, ten, including Goodwin, are prominent citizens of Rochester, but not one of them, excepting Goodwin, has ever owned a single share of voting stock but merely serve on the Board of Directors "as a matter of civic interest" (R. 148).

3. The approval of the Department of Justice under the so-called "Kingsbury Commitment" is irrelevant

Appellant relies upon the fact that the Department of Justice expressed the opinion that the or-

ganization of appellant "would not be contrary to the Kingbury Commitment" (Appellant's Brief, pp. 8, 22, 37, 38). Appellees contend that the action of the Department of Justice, whatever its meaning and effect, has no bearing upon the issue of corporate control now before this Court.

The circumstances which gave rise to the "Kingsbury Commitment" may briefly be described as follows: During the years prior to 1913, the American Telephone and Telegraph Company and its subsidiaries succeeded in purchasing a number of financially unsuccessful independent companies, with the result that complaints against these acquisitions were filed with the Attorney General of the United States (R. 36). In 1913 the Department of Justice was considering whether to take steps, under the provisions of the Sherman Act, to prevent the further acquisition of independent companies by the Bell System (R. 36). In order to avoid impending difficulties with the government because of these practices, Mr. N. C. Kingsbury, the Vice-President of the American Telephone and Telegraph Company, held several conferences with the Attorney General regarding the policy of his company (R. 36). These conferences resulted in a letter dated December 19, 1913, written by Mr. Kingsbury to the Attorney General (R. 296–299). The letter read in part as follows (R. 297):

> Neither the American Telephone and Telegraph Company nor any other company in

> the Bell system will hereafter acquire, directly or indirectly, through purchase of its physical property or of its securities, or otherwise exercise dominion or control over any other telephone company owning, controlling, or operating any exchange or line which is or may be operated in competition with any exchange or line included in the Bell system, or which constitutes or may constitute a line or portion of any system so operated or which may be so operated in competition with any exchange or line included in the Bell system.

Prior to, and at the time that this letter was written, the New York Telephone Company, a subsidiary of the American Telephone and Telegraph Company, was operating in competition with several independent telephone companies in western New York State. These competing independent companies were the Federal Telephone and Telegraph operating in Buffalo, the Home Telephone Company in Jamestown, and the Rochester Telephone Company in Rochester (R. 39, 299–303). The organization of appellant was a part of a general plan for dealing with the competitive situation which existed in Buffalo and Jamestown, as well as in Rochester. The plan provided for the acquisition by the New York Company of the Federal Telephone and Telegraph Company operating in Buffalo and for the organization of new companies in Rochester and Jamestown to take over and operate the properties previously held in those terri-

tories by the New York Company and certain independent companies (R. 39, 40, 296–299).

This plan was submitted by Mr. Kingsbury to the Attorney General of the United States in a letter dated November 9, 1917, which states, among other things, that "public approval" of the plan had already been expressed in the various company territories involved and requested the approval of this arrangement by the Department of Justice (R. 39–40, 299–303). In response to this letter, the Attorney General replied on January 11, 1918 (R. 346):

> Of course the Department cannot undertake either to approve or disapprove these proposed transactions in the sense of determining whether they would or would not violate any law of the United States, since that is a judicial question, and its determination might, moreover, be affected by other transactions not now before the Department. However, as the commitment of the American Telephone and Telegraph Company expressed in its letter to the Attorney General dated December 19, 1913 [Kingsbury Commitment] was formulated in conference with the Attorney General it is proper to say that, *assuming the facts and conclusions stated in your letter of November 9, 1917, and disclosed by the other data submitted, to be accurate and complete in all respects, especially the representation that because of its insolvent condition the*

Federal Company could not in any event continue as a going concern, the proposed plan for readjustments at Buffalo, Rochester, and Jamestown and in the tributary districts, taken by itself, would not in the opinion of the Department be contrary to that commitment [R. 349–350]. [Italics supplied.]

As the text of this letter shows, it was nothing more than an informal expression of opinion by the Department of Justice that the proposed arrangements did not violate the conditions laid down in Mr. Kingsbury's letter of December 19, 1913. As such, it has, of course, no decisive legal effect. The letter does not on its face purport to express even an informal opinion as to whether, if the transaction were consummated, the New York Company would control the appellant. Inasmuch as the letter of the Department was based entirely upon paper representations which at the time the letter was written had not been carried out, any expression of opinion on that question would necessarily have been of little consequence.

Furthermore, even if it were assumed that the letter by implication expressed some opinion on the subject of control, it by no means follows that the expression of opinion would have any relevance in the instant case. The Kingsbury Commitment was made with reference to possible violations of the Sherman Antitrust Act. The test of corporate con-

trol applicable to determine whether that Act has been violated has no necessary bearing upon the issue in the instant case. The question at bar is whether the New York Telephone Company controls appellant within the meaning of Section 2 (b) (2) of the Communications Act of 1934. The factors which constitute control for purposes of the kind of regulatory jurisdiction conferred by the Communications Act of 1934 differ from the factors which are relevant in a case arising under the anti-trust laws.

Finally, the opinion of the Department was given at a time when the arrangements for the organization of the appellant had not been consummated. The situation must now be viewed in the light of facts and of experience which the Department of Justice could not consider in 1918. The frank admissions of Mr. Goodwin as to the purpose in creating the voting trust and the history of the voting trust itself since 1921, for example, are factors which the Department of Justice could not have considered in 1918 in formulating its opinion. Nevertheless, these are factors which may properly be taken into account in consideration of an issue of control. It is evident that the situation existing in 1921 may well have been so different from the situation existing fifteen years later that no opinion expressed on the one situation would have any bearing upon the other.

IV

THE COURT BELOW DID NOT ERR IN ITS CONSIDERATION OF THE EVIDENCE IN THE RECORD BEFORE THE COMMISSION

Appellant contends that the court below erred in failing to exercise an independent judgment of the evidence on the issue of control (Appellant's Brief, pp. 16–20). There is no question in this case of a denial of the right to a trial *de novo* on the issue of control. In the court below, appellant indicated that it did not desire to introduce any evidence but was willing to rest its case on the record made before the Commission (R. 449). In fact, it was apparently appellant's view at that time that the court was only required to review the record before the Commission to determine if there was evidence to support the Commission's finding.[18]

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[18] The bill of complaint alleges that "Upon the facts proved before said Commission by undisputed and uncontradicted evidence" the Company was entitled to exemption under Section 2 (b) (2) of the Act (R. 4). On oral argument in the court below appellant confined its case to the lack of any evidence whatsoever to support the determination of the Commission and did not request the court to independently review that evidence and reach an independent determination. In its brief in that court appellant stated: "The purpose of this review is to have this court determine whether there are substantial *facts* to support the Commission's conclusion" (District Court Reply Brief of Rochester Telephone Corporation, p. 4). Appellant now seeks to charge as error the failure of the court below to go beyond what appellant then considered to be the scope of the issue

The argument now advanced by appellant raises two fundamental questions: *First,* was the determination here involved one which had been confided to the Commission by Congress and therefore final if not arbitrary or unreasonable and, *second,* did the court below exercise its independent judgment on the evidence before it? It is our view that the Commission was authorized by Congress to make the determination and that the court below should have reviewed the evidence before the Commission only for the purpose of determining whether there was any evidence to support the finding. However, we think that the court's opinion, findings of fact, and conclusions of law clearly indicate that it went farther and exercised its independent judgment on all of the facts. We therefore insist that regardless of what may be the proper scope of review, the decision of the court below should be affirmed.

A. THE COMMISSION WAS AUTHORIZED BY CONGRESS TO MAKE THE DETERMINATION HERE INVOLVED

Appellant's primary contention with respect to the scope of review relates to the jurisdiction of the Commission to make the determination as to control. It is contended by appellant that "Congress

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in the case. However, it should be noted that appellant did not assign as error nor did it state as one of the points to be relied upon in this Court the alleged failure of the court below to independently review and consider the evidence on the issue of control.

did not delegate this power to the Commission" (Appellant's Brief, p. 18). A substantial portion of this brief (*supra,* pp. 19–33) has been devoted to an analysis of the congressional intention with respect to the meaning of the term "control" as used in the exemption clause of the Act. In view of the difficulties which Congress anticipated in connection with the application of that term to particular situations, we submit that it was the intention of Congress that this determination should be made by the Commission. Such an implication arises from the "full authority and power" of the Commission under the Act to "institute an inquiry, on its own motion. * * * concerning which any question may arise under any provision of this Act, or relating to the enforcement of any provision of this Act" (Section 403, 48 Stat. 1094, June 19, 1934). This implication is strengthened by reason of the practical difficulties which the courts would experience in attempting to determine the issue of control in regard to the numerous local telephone companies claiming exemption under the Act [19] and by the fact that the administration of the Communications Act as a whole has been committed to an agency specially qualified to make such a determination on the facts presented to it in the course of a regularly conducted hearing. There would appear to be no logical justification for refusing to

[19] See the cases cited in note 23, *infra.*

permit the Commission to decide an issue which does not substantially differ from the other determinations which it is specifically required to make under the Act.

The administrative proceedings which lie at the foundation of this controversy were conducted, as stated above, pursuant to the authority vested in the Commission by Section 403 of the Communications Act.[20] By virtue of the authority contained in Sections 203 (a), 210, 211 (a), 213, and 215 of the Act, the Telephone Division of the Commission issued general orders Numbers 1, 2, 3, 5, 6a, and 9, requiring the submission of detailed information concerning the organization, operation, and management of wire telephone carriers subject to the Commission's jurisdiction (R. 20–30). This information was required to be filed with the Commission at various times between September 1, 1934, and March 1, 1935 (*Ibid.*). On February 28, 1935, the Telephone Division issued a notice that it had under consideration "the matter of the jurisdiction of the Commission under the Communications Act of 1934 * * *; and particularly the application of Sec. 2 (b) (2)." *In the Matter of Classification of Telephone Companies,* 3 F. C. C. 37, 38. Many carriers, claiming exemption from the jurisdiction of the Commission on the basis of Section 2 (b) (2), requested an opportunity to present argument to the Commission in support of their

[20] This section is set forth in the appendix at page 87, *infra.*

construction of the Act. The Commission granted this request and, following an extended hearing, oral argument, and the submission of briefs by interested parties, the Commission issued a report stating, among other things, that the term "control" as used in Section 2 (b) (2) of the Act "contemplates a mixed question of fact and law to be determined in each case heard and considered by the Commission." *In the Matter of Classification of Telephone Companies,* 3 F. C. C. 37, 39.

On October 14, 1935, upon the failure of appellant to respond to the general orders of the Telephone Division applicable to carriers within its jurisdiction, the Commission issued an order requiring that appellant either file the information requested in said orders or file an answer setting forth the facts upon which appellant justified its failure to respond to said orders of the Telephone Division (R. 6). Relying upon its authority under Section 403 of the Act, the Commission held a hearing in order to give appellant ample opportunity to state its objection to the submission of information requested in the general orders of the Telephone Division (R. 30). It should be noted that at this time the Commission could have enforced its general orders against appellant by application to the appropriate district court of the United States pursuant to its authority under Section 401 of the Act.[21] Instead, however, the Commission

[21] This section is set forth in the appendix at page 86, *infra.*

utilized its authority under Section 403 in order to accord appellant an opportunity to demonstrate that it was within the exemption set forth in the Act. At the conclusion of the hearing, and after argument and the submission of briefs, the Commission pursuant to its authority under Section 404 of the Act issued "a report in writing * * * together with its decision" classifying appellant as a carrier subject to the terms of the Act.[22] This practice has been uniformly followed by the Commission in those cases where the single question involved was that of an exemption under Section 2 (b) (2) of the Act.[23] It is submitted that the Com-

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[22] This section is set forth in the appendix at page 88, *infra*.

[23] *Capital City Telephone Company*, 3 F. C. C. 189; *Champaign Telephone Company*, 3 F. C. C. 379; *Chillicothe Telephone Company*, 3 F. C. C. 233; *Citizens Telephone Company of Clay County*, 3 F. C. C. 203; *De Calb-Ogle Telephone Company*, 3 F. C. C. 239; *Intra State Telephone Company*, 3 F. C. C. 170; *Mansfield Telephone Company*, 3 F. C. C. 263; *Cass County Telephone Company* 3 F. C. C. 406; *Rochester Telephone Corporation*, 3 F. C. C. 247; *Garrett Telephone Company*, 3 F. C. C. 320; *Princeton Telephone Company*, 3 F. C. C. 164; *Jamestown Telephone Corporation*, 4 F. C. C. 326; *In the Matter of North-West Telephone Co.*, Docket No. 3364, decided August 2, 1938; *In the Matter of Milton & Milton Junction Telephone Co.*, Docket No. 3360, decided August 2, 1938; *In the Matter of Norfolk & Carolina Tel. and Tel. Co.*, Docket No. 4830, decided October 25, 1938; *In the Matter of Norfolk & Carolina Tel. and Tel. Co. of Va.*, Docket No. 4831, decided October 25, 1938; *In the Matter of Tri-County Telephone Co.*, Docket No. 4344, decided April 20, 1938; *In the Matter of Santa Barbara Telephone Co.*, Docket No. 3311, decided May 11, 1938.

mission was completely justified in using this administrative procedure under Sections 403 and 404 of the Act rather than its enforcement authority under Section 401 of the Act. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

B. THE DETERMINATION OF THE COMMISSION WAS BINDING ON THE COURT BELOW

Prior to 1934 federal supervision of interstate telephone carriers was vested in the Interstate Commerce Commission. By the provisions of the Communications Act of 1934 carriers engaged in interstate communication by wire or radio were subjected to new legislation administered by the Federal Communications Commission. The language of the Act to Regulate Commerce in its regulatory and procedural aspects is substantially similar to analogous provisions of the Communications Act of 1934 and orders issued under both acts are reviewable by the same procedure. Neither act contains any statutory language defining or limiting the scope of judicial review in these proceedings. It is therefore necessary, in determining the extent to which the courts are authorized to review the orders of the Federal Communications Commission to examine the decisions discussing the scope of review with respect to orders of the Interstate Commerce Commission. See *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, and *American Telephone & Telegraph Company* v. *United States*, 299 U. S. 232.

This Court has decided in numerous cases that the determinations of the Interstate Commerce Commission [24] as well as of other administrative bodies [25] are binding if they are supported by substantial evidence and are not arbitrary or capricious. In *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470, this Court stated that it would not "under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon [its] conception as to whether the administrative power has been wisely exercised." On other occasions it has been stated that "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its con-

[24] *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Pennsylvania Company* v. *United States*, 236 U. S. 351; *Florida* v. *United States*, 292 U. S. 1; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57; *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282; *Virginian Ry.* v. *United States*, 272 U. S. 658; *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775.

[25] *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51; *Acker* v. *United States*, 298 U. S. 426, 434; *Morgan* v. *United States*, 298 U. S. 468, 477; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Decatur* v. *Pauling*, 14 Pet. 497; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479; *Lewis* v. *Frick*, 233 U. S. 291; *Tang Tun* v. *Edsell*, 223 U. S. 673.

clusions, or with the alleged inconsistency with findings made in other proceedings before it" (*Virginian Ry.* v. *United States,* 272 U. S. 658, 665), and that "Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment" (*Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304). Appellees submit that these decisions correctly state the rule which should be applied in reviewing the order here involved.

The determination made by the Commission is not one of law upon which courts must exercise independent judgment

Appellant contends that the issue of corporate control is a question of law or at least a mixed question of law and fact with respect to which the court below should have exercised its own independent judgment (Appellant's Brief, p. 17). Appellees concede that where the validity of administrative determination depends upon pure question of law the trial court must exercise its independent judgment in deciding the controverted issue. But the issue of corporate control in this case does not depend upon a question of law; the question of control raises an ultimate issue of fact.

In its bill of complaint appellant implies that because in its opinion the evidence before the Commission was undisputed and uncontradicted, the Commission committed an error of law in determining that it was controlled by the New York Tele-

phone Company. This Court has held that, even in those cases where the facts are not in dispute, the binding effect of an administrative determination, if supported by substantial evidence, must be recognized. In *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, the defendants contended that, since the facts asserted in the administrative proceedings were not disputed, the issue became one of law and the lower court was not bound by the decision of the Interstate Commerce Commission as to the meaning of the term "undue preference." In reply to that contention, this Court said (p. 320–321):

> * * * the court below, in substituting its judgment as to the existence of preference for that of the Commission *on the ground that where there was no dispute as to the facts it had a right to do so,* obviously exerted an authority not conferred upon it by the statute * * *. It cannot be otherwise since, if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action. [Italics supplied.]

The mere fact that the administrative agency is required to exercise its judgment on the facts in reaching its conclusion does not controvert an ordinary fact determination into a question of law upon which the trial court must exercise its independent judgment. In the usual case where the

courts are called upon to review administrative determinations it is well settled that "The judicial function is exhausted where there is found to be a rational basis for the conclusion approved by the administrative body." *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286–287.

It is true that the determination as to whether appellant is directly or indirectly controlled by the New York Telephone Company is a question which requires the application of a statutory concept to facts. However, appellant has no serious quarrel with the interpretation which the Commission and the court below have placed upon the concept of corporate control as revealed by the legislative reports on the legislative antecedents of the Communications Act of 1934.[26] Appellant's contention is that the facts contained in the record before the Commission establish that appellant comes within the meaning of the exemption section *as interpreted by both the Commission and the court below.* This approach does not convert a factual determination into a question of law.

Properly regarded, the question as to whether appellant is controlled by another company would appear to be a basic question of fact, independent of any legal issue. The concept of corporate control has a generally recognized meaning, although there may be differences of opinion as to whether

[26] House Report 1850, 73rd Cong., 2nd Sess., pp. 4–5. See Appellant's Brief, p. 20.

particular devices or practices on the borderline come within its terms. But the difficulty in deciding such borderline situations does not make the determination as to control any less one of ultimate fact. It was in precise recognition of this possible difficulty in applying the concept of control to particular situations that Congress refused to define the term and left its application to the Commission to be administered in the exercise of its sound discretion.

However, the proper scope of judicial review in this case does not depend upon any distinction between questions of law and questions of fact. This Court has frequently alluded to the function of the Interstate Commerce Commission in determining whether a particular rate was unreasonable or discriminatory both as making "a determination of fact" (*Virginian Ry.* v. *United States,* 272 U. S. 658, 665) and as "determining mixed questions of law and fact" (*Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, 547). But this Court has not permitted such artificial distinctions to broaden the scope of judicial review with respect to these determinations. In both the *Virginian Railway* and *Union Pacific* cases the Court has indicated that the decisions of the Interstate Commerce Commission as to what constitutes an unreasonable or discriminatory rate, or an undue preference, are binding if supported by substantial evidence and

not arbitrary or capricious. The authority of the Federal Communications Commission to determine where appellant is directly or indirectly controlled by another telephone company would seem to be clearly of the same character as that of the Interstate Commerce Commission in determining the lawfulness of certain rate practices. See *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238; *Seaboard Air Line Railway Co.* v. *United States,* 254 U. S. 57, 62; *Kansas City Southern Railway Co.* v. *United States,* 231 U. S. 423, 456.

The scope of review in this case is not determined by the decision in the Idaho case

Appellant contends that the question of the scope of review applicable in the instant case is foreclosed by the decision in *United States* v. *Idaho,* 298 U. S. 105. This argument begs the question. If this Court agrees with our interpretation of the intent of Congress as disclosed by the entire Act read in the light of its legislative history, the determination of the issue of control was left to the Commission and not to the courts (see, *supra,* pp. 60–65). It follows that the scope of review which must be applied to this determination is governed by the decision of this Court in *Shields* v. *Utah Idaho Central R. R. Co.,* 305 U. S. ——, and not by the decision in *United States* v. *Idaho,* 298 U. S. 105.

In *United States* v. *Idaho,* 298 U. S. 105, this Court held that the determination of the Inter-

state Commerce Commission as to whether a certain trackage was a "spur" and thus within its jurisdiction was a question which had been "left by Congress to the decision of a court—not to the final determination of either the federal or a state commission" (298 U. S. 105, at 109). This Court reached a similar conclusion with respect to a determination of the Interstate Commerce Commission as to whether a railroad was an interurban railway within the meaning of the Act to Regulate Commerce. *Piedmont & Northern Ry.* v. *Interstate Commerce Commission,* 286 U. S. 299; *United States* v. *Chicago North Shore R. Co.,* 288 U. S. 1. In *Shields* v. *Utah Idaho Central R. R. Co.,* 305 U. S. —, this Court held that Congress had expressly authorized the Interstate Commerce Commission to determine whether a particular railroad was exempted from the Railway Labor Act by reason of its being an interurban electric railway. Under these circumstances, it was held that the determination of the Interstate Commerce Commission was binding on the court if supported by substantial evidence.

It is submitted that the authority conferred by Sections 403 and 404 of the Communications Act authorizes the Commission to make a determination of exemption just as the Interstate Commerce Commission has been empowered to make such a determination under the Railway Labor Act. Hav-

ing utilized its authority under Sections 403 and 404 and having given appellant an opportunity to be heard, offer oral argument and submit briefs on the issue of corporate control, appellees do not believe, in the language of this Court, "that a determination so prescribed and safeguarded was intended to have no legal effect." *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. — at —. In this view of the matter, the determination of the Commission with respect to the control of appellant was binding on the court below since it was supported by substantial evidence and was neither arbitrary nor capricious.

C. THE COURT BELOW INDEPENDENTLY CONSIDERED THE EVIDENCE

For the reasons set forth above we believe that it was unnecessary for the court below to exercise its independent judgment on the facts involved in this controversy. However, the opinion of the court and its elaborate findings of fact and conclusions of law clearly demonstrate that the court did weigh and independently consider the evidence adduced before the Commission. The findings of fact are twenty in number and cover practically every factual aspect of the present controversy (R. 438–447). Similarly, the opinion of the court indicates that the evidence in the record was independently considered by that court with respect to the controverted issue of control. In its

opinion, the court concisely stated its view of the weight of the evidence as follows: "The plan providing for the organization and incorporation, election of directors, and placing the common stock in a voting trust gave control directly and indirectly to the New York Telephone Company" (R. 437).

The portions of the Court's opinion, torn from their context and quoted in appellant's brief (p. 16), concerning the "binding" effect of the Commission's determination do not prove that the court failed to exercise its independent judgment on the facts. If such language has any significance, it is no more than an expression of the court's view on what the scope of review should be with respect to the issue of control—not a statement of the test which was actually applied. Such statements without more do not detract from the deliberate effort of the court to reach its independent conclusion on the evidence.[27] A similar situation was

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[27] There is a logical explanation for this seeming inconsistency in the court's opinion. In their argument before the District Court appellees contended that an independent review of the evidence by the court would reveal that appellant was not entitled to exemption under Section 2 (b) (2) of the Act. But appellees also argued that the determination of the Commission on the issue of control was binding on the court since it was supported by substantial evidence and not arbitrary or capricious. Appellees requested the court to rule on both of these points. Even if the opinion is interpreted as holding that the limited scope of review should apply, it is equally clear that the court sustained appellees' contentions on the basis of an independent review

presented to this Court in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38. In reply to a contention such as is now made by appellant this Court said (p. 54):

> As the District Court, despite its observations as to the scope of review, apparently did pass upon the evidence, making findings of its own and adopting findings of the Secretary, we do not think it necessary to remand the cause for further consideration * * *

Appellant further contends that because the decision of the court below agrees with or substantially follows the report of the Commission, the court failed to exercise its independent judgment. In its brief (p. 16) appellant states "A comparison of the Court's Opinion (R. 437) with the report of the Commission (R. 429) also indicates that the Court made no independent scrutiny of the evidence." The logical implication from this observation seems to be that judicial review is not independent unless the court's opinion differs from or disagrees with the basic determinations of the administrative body. Such a proposition finds no support in the decisions of this Court.

It may be assumed that the court below, in the exercise of its independent judgment on the facts,

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of the evidence. This is the same position which was taken by appellees and the same method of review employed by the lower court in *St. Joseph Stock Yards Co.* v. *United States,* 11 F. Supp. 322; *aff'd.* 298 U. S. 38.

properly accorded some weight to the determination of the Commission. In adopting the broader scope of judicial review the court would not have been justified in totally ignoring the Commission's decision on the issue of control. It is well settled that even though a trial court is required to review *de novo* an administrative finding, the administrative decision, reached after notice and complete hearing, is entitled to great respect. In *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, a case involving an issue of confiscation, this Court said (p. 53):

> *But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence.* On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. [Italics supplied.]

CONCLUSION

For the foregoing reasons the decree of the court below dismissing the bill of complaint should be affirmed.

Respectfully submitted.

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MARCH 1939.

APPENDIX

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064; U. S. C., Title 47, Sec. 151) are as follows:

SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter

provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Philippine Islands or the Canal Zone, or to wire or radio communication or transmission wholly within the Philippine Islands or the Canal Zone.

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier; except that sections 201 to 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2).

* * * * *

SEC. 4. * * * * (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

* * * * *

Section 201. (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to

establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided,* That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest.

SEC. 202. (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or local-

ity to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of wires in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

SEC. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

* * * * *

SEC. 205. (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them,

who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

* * * * *

SEC. 219 (a) The Commission is authorized to require annual reports under oath from all carriers subject to this Act, and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, any such carrier, to prescribe the manner in which such reports shall be made, and to require from such persons specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amount and privileges of each class of stock, the amounts paid therefor, and the manner of payment for the same; the dividends paid and the surplus fund, if any; the number of stockholders (and the names of the thirty largest holders of each class of stock and the amount held by each); the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the names of all officers and directors, and the amount of salary, bonus, and all other compensation paid to each; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the oper-

ating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same, as the Commission may require.

(b) Such reports shall be for such twelve months' period as the Commission shall designate and shall be filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time is granted in any case by the Commission; and if any person subject to the provisions of this section shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such person shall forfeit to the United States the sum of $100 for each and every day it shall continue to be in default with respect thereto. The Commission may by general or special orders require any such carriers to file monthly reports of earnings and expenses and to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act; and such periodical or special reports shall be under oath whenever the Commission so requires. If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the

Commission, it shall be subject to the forfeitures above provided.

* * * * *

SECTION 401. (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for

the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

* * * * *

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license), and such suits are hereby authorized to be brought as provided in that Act.

* * * * *

SEC. 403. The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or re-

lating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

SEC. 404. Whenever an investigation shall be made by the Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

* * * * *

SEC. 409. * * * (j) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules of charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpena or lawful requirement of the Commission, shall be guilty of a misdemeanor and, upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

SEC. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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SUPREME COURT OF THE UNITED STATES.

No. 481.—October Term, 1938.

Rochester Telephone Corporation, Appellant, vs. The United States of America and Federal Communications Commission.	On Appeal from the District Court of the United States for the Western District of New York.

[April 17, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an appeal, under Sec. 238 of the Judicial Code as amended (28 U. S. C. § 345), from a final decree by a district court of three judges, under the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. §§ 45, 47a) as extended by Sec. 402(a) of the Federal Communications Act (47 U. S. C. § 402(a)), dismissing on the merits a bill to review an order of the Federal Communications Commission. 47

At the outset a challenge to the jurisdiction of the District Court confronts us. It involves those problems of administrative law which are implied by the doctrine of "negative orders." Inasmuch as this phrase is shorthand for a variety of situations, sharp heed must be given to the precise circumstances—*inter alia*, the statutory provisions for review, the terms of the contested order, the grounds of objection to it—which in this and other cases have invoked the doctrine.

Section 2(b) of the Communications Act of 1934 provides that, with certain exceptions not here material, the Communications Commission shall not have jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier." The appellant, Rochester Telephone Corporation (hereafter called the Rochester), is a New York corporation maintaining a system of telephone communications in and around the City of Rochester. For present purposes the Rochester is to be deemed as engaged in interstate communications solely because of physical connections with the facilities of the New York Telephone Company (hereafter called the New York).

The present controversy grew out of a ruling by the Federal Communications Commission that the Rochester owed obedience to a series of orders issued by the Commission. These orders required all telephone carriers subject to the Act to file schedules of their charges, copies of contracts with other telephone carriers, information concerning their corporate and service history, their relations with affiliates, their use of franks and passes. Copies of these orders were duly served on the Rochester. No response being had, the Telephone Division of the Communications Commission, on October 9, 1935, ordered the Rochester to show cause why it should not be required to file responses to the general orders theretofore served upon it.[1] The Rochester answered, claiming to be outside the requirements of the Act except as to matters not here questioned.

To ascertain the facts in the contested issue, the Commission appointed a trial examiner. At hearings held by him the Rochester entered a special appearance, denying the Commission's jurisdiction and contending that the burden of proof was on the Commission to show that Rochester did not come within the exclusionary provisions of Section 2(b)(2). After a thorough hearing[2] and the submission of briefs, the examiner filed his report, to which the Rochester duly excepted. Upon the basis of these proceedings and of argument before it, the Commission, through its Telephone Division, sustained the findings of its chief examiner, determined that the Rochester was under the "control" of the New York and therefore not entitled to the classification of a mere connecting carrier under Section 2(b) (2). Accordingly, the Commission ordered the Rochester classified "as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division." A petition for rehearing before the full Commission was denied.

The Rochester thereupon filed the present bill, alleging that the order entered by the Commission on November 18, 1936, pursuant to its Report, was contrary to undisputed facts and erroneous as a matter of law, and that the Commission's threat to enforce it put the Rochester to the hazard of irreparable injury, and praying that the District Court

"make and enter its order and decree setting aside and annulling said orders of the Federal Communications Commission herein-

[1] On November 18, 1935, the order was amended in matters not here relevant.

[2] The hearing before the examiner lasted two days; 221 pages of testimony were taken and 34 exhibits were introduced.

before mentioned, and each and all of them, and enjoining the enforcement of said orders, except in so far as the provisions of said orders . . . have already been complied with."

The case was disposed of in the District Court on the pleadings and the record before the Commission.

Below, the Government made no objection to the District Court's jurisdiction, nor did that Court raise the question *sua sponte*.[3] It sustained the Commission's action on the merits and dismissed the bill. Here, the Government urges that under the doctrine of "negative orders" the Commission's order was not reviewable, but, in the alternative, supports the decree on the merits.

The relation of action by the Federal Communications Commission to the reviewing power of the courts is here for the first time. The jurisdictional objection raised by the Government in this case implicates other federal regulatory bodies as well, because the various statutory schemes for judicial review have either been carried over from the Urgent Deficiencies Act, pertaining to orders under the Acts to Regulate Commerce, or because different statutory provisions have by analogy been assimilated to the "negative order" doctrine. That doctrine has not had wholly plain sailing in the many cases, both here and in the lower federal courts, since it first got under way in 1912, in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282.

The important procedural problems with which this case is entangled therefore call for clarification.

The prior decisions involving the "negative order" doctrine fall into three categories:[4]

> (1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.
>
> (2) Where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or

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[3] Under United States v. Corrick, 298 U. S. 435, 440, and United States v. Griffin, 303 U. S. 226, 229, the doctrine of "negative orders" implies a jurisdictional defect which courts must consider *sua sponte*.

[4] All except one of the prior decisions of this Court on the "negative order" doctrine involved review of action by the Interstate Commerce Commission. United States v. Corrick, *supra*, note 3, involved review of action by the Secretary of Agriculture under the Packers and Stockyards Act.

compelling conduct on his part. The most obvious case is a denial of permission by the Interstate Commerce Commission for a departure from the long-short haul clause.

(3) Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person. A familiar example is that of a shipper requesting the Interstate Commerce Commission for an order compelling the carrier to adopt certain rates or practices which the Commission, on the merits, declines. Another instance is where the Commission authorizes the carrier to depart from the long-short haul clause and a shipper adversely affected seeks to have the authorization set aside.

In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province. Thus, orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction,[5] or rendering a tentative[6] or final valuation[7] under the Valuation Act, although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act and therefore amenable to the National Mediation Board, are not reviewable.[8]

The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a "final valuation" under the Valuations Act: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309-310.

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[5] United States v. Illinois Central R. R., 244 U. S. 82. Compare Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375.

[6] Delaware & Hudson Co. v. United States, 266 U. S. 438.

[7] United States v. Los Angeles R. R., 273 U. S. 299.

[8] Shannahan v. United States, 303 U. S. 596; compare Shields v. Utah Idaho Central R. R., 305 U. S. 177, 182-184.

Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article III of the Constitution by what is implied from the grant of "judicial power" to determine "Cases" and "Controversies," Art. III, Sec. 2, U. S. Constitution.[9] Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loathe to authorize review of interim steps in a proceeding.[10]

Group (2) is composed of instances of statutory regulations which place restrictions upon the free conduct of the complainant. To rid himself of these restrictions the complainant either asks the Interstate Commerce Commission to place him outside the statute, or, being concededly within it, he invokes the Commission's dispensing power. In this type of situation a complainant seeking judicial review under the Urgent Deficiencies Act of adverse action by the Commission must clear three hurdles: (a) "case" or "controversy" under Article III; (b) the conventional requisites of equity jurisdiction; (c) the specific terms of the statute granting to the district courts jurisdiction in suits challenging "any order" of the Commission.

Where a complainant seeks the Commission's authority under the terms of a statute and the Commission's action is followed by legal consequences, as was the case in *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412, or where the Commission's order denies an exemption from the terms of the statute, as in the *Intermountain Rate Cases,* 234 U. S. 476, the road to the courts' jurisdiction seems to be clear. There is a constitutional "case" or

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[9] Hayburn's Case, 2 Dall. 409, is the symbol for considerations which limit the constitutional power of the federal courts, though that case itself never reached adjudication. See, also, United States *v.* Ferrreira, 13 How. 40; Muskrat *v.* United States, 219 U. S. 346.

[10] Prior to Section 7 of the Act of March 3, 1891, authorizing an appeal to the Circuit Court of Appeals from a decree granting a preliminary injunction, review in a case not involving a final judgment was unknown in the federal judicial system, except insofar as it was present in the practice of certification introduced by Section 6 of the Act of April 29, 1802. See United States *v.* Bailey, 9 Pet. 267. For state court decisions the requirements for finality of the original Judiciary Act have been adhered to. Section 237, Judicial Code as amended, 28 U. S. C. Sec. 344. Review of action of the federal district courts not involving final judgments can be had only in a limited class of cases dealing with interlocutory injunctions, receiverships, and criminal appeals. Section 129 and 238 of the Judicial Code as amended, 28 U. S. C. Sec. 227, 345. This Court, however, may take jurisdiction on certiorari before the appellate jurisdiction of the circuit court of appeals is exhausted.

"controversy," *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties; and the suit is within the express language of the Urgent Deficiencies Act in that it is one "to enjoin, set aside, or annul" an "order of the Commission." 28 U. S. C. Sec. 46, 47.[11] While the penalties may be imposed by the statute for its violation and not for disobedience of the Commission's order, a favorable order would render the prohibitions of the statute inoperative.

[11] The Lehigh Valley case apparently originated the statement, often made in "negative order" cases, that the risk results from the statute, not from the order. But this formula hardly squares with the actualities of the situation in that case. The Panama Canal Act, paragraphs 19-21 of Section 5 of the Act to Regulate Commerce, as amended, forbade community of interest between any common carrier subject to the Act and a competing water carrier. Under paragraph 20, jurisdiction was conferred on the Commission to determine questions of fact as to the existence of actual or potential competitive conditions, either on the application of the carrier or on the Commission's motion, its determination to be final. Under paragraph 21, the Commission was given jurisdiction to extend the time within which operations otherwise prohibited by the statute might be carried on after July 1, 1914, if such extension did not reduce competition and benefited the public. After receipt of notice of the Act from the Commission, the Lehigh applied to the Commission for a ruling that it was not subject to the Act, or, in the alternative, for an extension. The Commission issued an order subjecting the Lehigh to the Act and denying an extension. Thereupon the Lehigh brought a suit to set aside this order and to enjoin the Commission from enforcing it.

As a practical matter the risk of prosecution to which the Lehigh was subjected if it wished to continue to operate its boats was the result of the order. Since the Panama Canal Act provided that the Commission should find the facts under it, there could have been no prosecution without a previous finding by the Commission that the Lehigh was within the Act; once such a finding was made it was subject to the rule of administrative finality. Compare Keogh v. Chicago & N. W. Ry., 260 U. S. 156. Therefore the Commission's order that the Lehigh was subject to the Panama Canal Act was responsible for the risk, as much so as if it had expressly commanded the Lehigh to stop running its boat lines. And assuming the Lehigh was within the prohibition of the statute, the Commission's order denying an exception had the same practical effect as a direct command. Intermountain Rate Cases, 234 U. S. 476.

Piedmont & Northern Ry. v. United States, 280 U. S. 469, presents a more complicated situation. Section 1(18-22) of the Act to Regulate Commerce, as amended, prohibits any common carrier by rail subject to the Act from extending its lines or constructing new lines without a certificate of convenience and necessity. This requirement did not apply to "interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." Upon an application for a certificate by the Piedmont & Northern, coupled with a motion to dismiss on the ground that it was an "interurban electric" railway, for which no certificate was required, the Commission denied the motion to dismiss and denied the certificate on the merits. The bill to enjoin the Commission from taking any proceedings against the Piedmont & Northern under this order attacked the action of the Commission solely on its assumption of jurisdiction. The Court held the order was not reviewable, on the ground that the order did not adjudicate the railroad's status, did not command it to do anything, but only had the effect of increasing the Piedmont's doubts as to the correctness of its construction of the statute. To be sure, statutory construction is a judicial function. But this is to view the matter too abstractly. For the Commission itself had instituted the

The complainant can come into court, of course, not to review action within the discretionary authority of the Commission to render an adverse rather than a favorable decision but because he urges errors of law outside the Commission's final say-so. Such an analysis emerges from a long sequence of cases under the Urgent Deficiencies Act viewed in the setting of general doctrines of federal jurisdiction. On the other hand, the result in the *Lehigh Valley* case was reached in the earlier phases of modern administrative law and did not deal with its specific jurisdictional problems in the perspective of underlying principles governing federal equitable jurisdiction. In consequence, the phrase "negative orders" gained currency as though it were descriptive of some technical doctrine of jurisdiction having peculiar relevance to judicial review of orders of the Interstate Commerce Commission and comparable regulatory bodies.[12]

This brings us to the cases in group (3). Here review is sought of action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person. This type of situation is illustrated by *Procter & Gamble Co.* v. *United States*, 225 U. S. 282. Since this case gave rise to the notion that there is a specialized jurisdictional doctrine pertaining to "negative orders," it calls for re-examination. Procter & Gamble Co. filed a complaint with the Interstate Commerce Commission to set aside demurrage rules that imposed charges on private cars left unloaded for over forty-eight hours on

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system whereby it requested preliminary submission to it of the status of "interurban roads. Such a decision was at least the equivalent of a threat of prosecution under the statute, and, in fact, considerable weight is given to administrative practice in ascertaining the meaning of such legislation. Compare United States v. Village of Hubbard, 266 U. S. 474.

[12] The initial decision in this group of cases, the Intermountain Rate Cases, 234 U. S. 476, held reviewable the action of the Commission in refusing to grant requested consent to depart from the long-short haul clause. (Section 4 of the Act to Regulate Commerce, as amended.) While this case would seem to control the Lehigh Valley case and at least to be persuasive in the Piedmont & Northern case, it was not mentioned in them. After these two cases, subsequent decisions in this group indicated that the "negative order" doctrine might prevent review of the refusal by the Secretary of Agriculture to accept rates for filing, the Packers' and Stockyard's Act prohibiting the charging of rates except those on file with the Secretary, United States v. Corrick, 295 U. S. 435, and of the refusal to grant an increase in rates of compensation for carrying of mail, the Railway Mail Pay Act of 1916 requiring the carrier to carry the mail at the rate set, United States v. Griffin, 303 U. S. 226. But in both these decisions the result reached was supported by factors irrelevant to the present discussion. On the other hand, in Powell v. United States, 300 U. S. 276, action of the Commission, striking from its files a tariff on the ground that a point was not served by the carrier, was held subject to review as a command to the railway which had filed the tariff not to give the service covered by the tariff.

private tracks. The Commission dismissed the complaint on the ground that the rules were within the carriers' authority to make conditions for the acceptance of private cars. Procter & Gamble then petitioned the Commerce Court to annul the Commission's action and to enjoin the carriers from enforcing the rules. The Commerce Court took jurisdiction but found the Commission's action to be within its authority. On appeal this Court held that the Commerce Court erred in taking jurisdiction and remanded the cause for dismissal.

Clearly Procter & Gamble was authorized under Section 13 of the Act to Regulate Commerce to institute the proceedings before the Commission. Since it asserted a legal right under that Act to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication — constituting a case or controversy — were present. Compare *Interstate Commerce Commission* v. *Brimson, supra; Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 38. Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles. The requisites of equity have of course to be satisfied, but by the conventional criteria. They were satisfied in the *Procter & Gamble* case, since the bill sought to avoid a multiplicity of suits. Finally, the shipper was within the express language of Congress authorizing suits "to enjoin, set aside, annul, . . . any order of the Interstate Commerce Commission." To be sure the opinion in the *Procter & Gamble* case partly yielded to the Government's main contention in that case that the jurisdictional statute only applied where the order complained of was one which was to be enforced by the Commission. More recent decisions of this Court however, have dispensed with this requisite for review.[13]

The impelling consideration underlying the decision in the *Procter & Gamble* case did not concern technical procedure. It was part of the process of adjusting relations between the Interstate Commerce Commission and the courts to effectuate the pur-

[13] The Chicago Junction Case, 264 U. S. 258; Venner v. Michigan Central R. R., 271 U. S. 127; Colorado v. United States, 271 U. S. 153; Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382; United States v. Idaho, 298 U. S. 105.

poses of the Commission. This is made abundantly clear by the general atmosphere of the opinion as well as by its language,[14] particularly when regard is had to the fact that the Court's spokesman was Chief Justice White, who had such a large share in developing modern administrative law.[15] While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act, in 1906,[16] and the Mann-Elkins Act, in 1910,[17] the establishment of similar agencies in many states following the lead of New York[18] and Wisconsin,[19] the widespread recognition that these specific instances marked a general movement,[20] made increasingly manifest the

14 " . . . we have learned of no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the Commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as to the meaning of the act to regulate commerce by dealing directly with the subject irrespective of any prior affirmative command or action by the Interstate Commerce Commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question without previous affirmative action by the Commission to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act." 225 U. S. at 296-97. " . . . the recognition of a right in a court to assert the power now claimed would of necessity amount to a substitution of the court for the Commission or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative." 225 U. S. at 298-99.

15 See Chief Justice Taft's estimate of the services of Chief Justice White in "a new field of administrative law": "The capital importance which our railroad system has come to have in the welfare of this country made the judicial construction of the interstate commerce act of critical moment. It is not too much to say that Chief Justice White, in construing the measure and its great amendments has had more to do with placing this vital part of our practical government on a useful basis than any other judge. His opinions in the case of the Texas & Pacific Railway Co. *v.* The Abilene Cotton Oil Co., and the cases which followed it, are models of clear and satisfactory reasoning which gave to the people, to state legislatures, to Congress, and the courts a much-needed knowledge of the practical functions the Commerce Commission was to discharge, and of how they were to be reconciled to existing governmental machinery, for the vindication of the rights of the public in respect of national transportation. They are a conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law." Proceedings on the Death of Chief Justice White, 257 U. S. v, xxv.

16 34 Stat. 584.

17 36 Stat. 539.

18 Laws of New York, One Hundred and Thirtieth Session, c. 429 (1907).

19 Wisconsin Laws of 1907, c. 499, st. 1797 m.

20 See, *e. g.*, Hughes, *Some Aspects of the Development of American Law* (1916) 39 N. Y. B. A. Rep. 266, 269-70; Root, *Public Service by the Far* (1916) 41 A. B. A. Rep. 355, 368-69; Sutherland, *Private Rights and Government Control* (1917) 42 A. B. A. 197.

place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This Court "ascribed" to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. Recognition of the Commission's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.[21]

From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 226. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked.[22] The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541.

In translating these important objectives for effectuating the Congressional scheme to enlarge the independent powers of the Interstate Commerce Commission into a seemingly technical distinc-

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21 Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 44; Interstate Commerce Commission *v.* Louisville & Nashville R. R., 227 U. S. 88, 93; United States *v.* Abilene & So. Ry., 265 U. S. 274, 288; compare Douglas *v.* Noble, 261 U. S. 165, 169. "It is, perhaps, not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad, or the Commission were bound by the rules of evidence applying to the introduction of testimony in courts." Twenty-second Annual Report of the Interstate Commerce Commission, 10.

22 See, also, *e. g.*, Baltimore & Ohio R. R. *v.* United States, ex rel. Pitcairn Coal Co., 215 U. S. 481; Robinson *v.* Baltimore & Ohio R. R., 222 U. S. 506; United States *v.* Pacific & Arctic Co., 228 U. S. 87; Texas & Pacific Ry. *v.* American Tie Co., 234 U. S. 138; Northern Pacific Ry. *v.* Solum, 247 U. S. 477; Director General *v.* Viscose Co., 254 U. S. 498; Dayton-Goose Creek Ry. *v.* United States, 263 U. S. 456; Western & Atlantic R. R. *v.* Georgia Public Service Comm., 267 U. S. 493; Midland Valley R. R. *v.* Barkley, 276 U. S. 482; Board of Railroad Commissioners *v.* Great Northern Ry., 281 U. S. 412. The doctrine has been given general application, *e. g.*, United States Navigation Co. *v.* Cunard Steamship Co., 284 U. S. 474 (Shipping Board); Myers *v.* Bethlehem Shipbuilding Corp., 303 U. S. 41 (National Labor Relations Board). Compare, also, Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210; Anniston Mfg. Co. *v.* Davis, 301 U. S. 337.

tion between "negative" and "affirmative" orders, the opinion in *Procter & Gamble* v. *United States* gave authority to a doctrine which harmonizes neither with the considerations which induced it nor with the course of decisions which have purported to follow it.[23] Subsequent cases have made it abundantly clear that "negative order" and "affirmative order" are not appropriate terms of art.[24] Thus, the Court has had occasion to find that while an order was "negative in form" it was "affirmative in substance."[25] "Negative" has really been an obfuscating adjective in that it implied a search for a distinction—non-action as against action—which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability.[26] "Negative" and "affirmative," in

[23] In Manufacturers Railway Co. *v.* United States, 246 U. S. 457, the Court treated as reviewable the action of the Commission in failing to require an absorption of switching charges or a requested joint rate but held not reviewable refusal to fix divisions. In part this may have been on the theory that the issue of the divisions was not properly before the Commission. See 246 U. S. at 482-483. In United States *v.* New River Co., 265 U. S. 533, the Court held reviewable the action of the full Commission dismissing a complaint by a shipper against certain car practices held invalid by one division of the Commission. Standard Oil Co. *v.* United States, 283 U. S. 235, held not reviewable the action of the Commission refusing to grant reparations, but the main basis of the decision was not the "negative order" doctrine but the statutory scheme dealing with reparations. In Alton R. R. *v.* United States, 287 U. S. 229, the Court held reviewable the action of the Commission refusing to interfere with divisions set by a railroad in violation of a previous agreement, the Court stating that the action of the Commission validated divisions which were previously invalid. See 287 U. S. at 236-237.

[24] The only test which can be derived from the cases in notes 11-13, 23, *supra*, is that an order is "affirmative" if it has the legal effect of changing the *status quo*, permitting what was previously not allowed or compelling what was previously not required. But on this test the order in the Lehigh Valley case was "affirmative". The decision in the New River Coal Co. case could hardly be hung on such a gossamer thread as this test, since there the only change in the *status quo* resulting from an order considered "affirmative" was that the order of the full Commission held unobjectionable a car practice which was the subject of complaint. A division of the Commission in the same proceeding had stated that the practice was invalid and should be abandoned and it was abandoned. After the full Commission found the practice not invalid and dismissed the complaint, the practice was adopted again.

[25] See Alton R. R. *v.* United States, 287 U. S. 229, 235.

[26] This becomes clear on analysis of the precise problem presented in the Procter & Gamble case. It was a dispute between shippers who owned private cars and those who did not as to the distribution of the cars owned by the carriers. The Commission was called upon to resolve that economic conflict by virtue of its authority to prevent practices which unfairly discriminated against one group at the expense of the other. Its final decision was based on a comprehensive policy concerning the place of private cars in our transportation system. Had the prior practice of the carriers been inconsistent with this policy, and the order of the Commission compelled a change, the private car shippers would admittedly have been entitled to test the validity of the Com-

the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between "nonfeasance" and "misfeasance".[27]

The considerations of policy for which the notions of "negative" and "affirmative" orders were introduced, are completely satisfied by proper application of the combined doctrines of primary jurisdiction and administrative finality. The concept of "negative orders" has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them. An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted.[28] An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. The nature of judicial relief, that is the form of directions available, in situations like those presented by the *Procter & Gamble* and the *Lehigh Valley* cases, were the Commission's orders reviewed, would be no different than was that used in the *Intermountain Rate* and the *New River Coal Co.* cases.[29] In both types of situations "a judgment rendered will be a final and

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mission ruling in the courts, subject, of course, to the canons of administrative finality. It seems capricious that the fact that the Commission's order authorized the preservation of the *status quo* should block any review at all. The force of this reasoning is emphasized when it is realized what small factors may determine whether the *status quo* has been changed, *e. g.*, a difference of views within the Commission, as in the New River Coal Co. case, *supra*, note 24. See the opinion of the Commerce Court sustaining reviewability in Procter & Gamble Co. *v.* United States, 188 Fed. 221.

[27] The Restatement of Torts does not employ this nomenclature. See, also, 7 LABATT, MASTER AND SERVANT, § 2586.

[28] Compare Inland Steel Co. *v.* United States, 305 U. S. —: ". . . . the Commission was acting in the interest of shippers generally and in behalf of of the public and the national railroad systems."

[29] In the Procter & Gamble case the judicial relief asked was that the order of the Commission dismissing the complaint against the demurrage rules be annulled and that the carriers be enjoined from applying those rules. In the New River Coal Co. case the judicial relief asked was that the car rule under

indisputable basis of action as between the Commission and the defendant,'' *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 38. We conclude, therefore, that any distinction, as such, between ''negative'' and ''affirmative'' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.

The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration regarding the status of the Rochester under the Communications Act,[30] nor was it a stage in an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission.

But while the Rochester had a right to challenge the order, it cannot prevail on the merits.

The ultimate legal issue is the validity of the Commission's finding that the Rochester ''is under the control of the New York Telephone Company''. The justification for this finding clearly emerges from a rapid summary of the governing facts adduced before the Commission concerning the relationship between the New York and the Rochester.

Prior to 1920 an independent telephone company and the New York (which was part of the Bell system) were competitors in Rochester. As part of an endeavor to meet an arrangement which the Bell system had, in 1913, made with the Department of Justice, the details of which need not here be recited, the Rochester was formed to consolidate the two previously competing enterprises. The property of the independent was paid for by bonds of the

attack be adjudged invalid, that the order of the Commission dismissing the complaint against it be adjudged invalid, that the carriers be enjoined from complying with the rule and that the Commission be enjoined from restricting the commerce of the complainants by its order and by the rule.

In the Lehigh Valley case the judicial relief asked was that the enforcement of the order of the Commission and the institution of any proceedings thereunder against the complainant be enjoined. In the Intermountain Rate cases the judicial relief asked was that the order of the Commission be set aside, that Section 4 of the Act to Regulate Commerce and be declared invalid, and that the Commission and the Attorney General be enjoined from taking any proceedings to prosecute the carriers for violation of Section 4.

[30] Compare United States v. Atlanta, B. & C. R. R., 282 U. S. 522.

Rochester, and the property of the New York by preferred stock, later designated as second preferred, of which the New York had the entire issue, 48,140 shares at $100 par. The Rochester issued 1000 shares of common stock, at $100 par, of which the New York purchased 335 shares. The New York also paid the officers of the independent company $70,000 for their services in consummating the consolidation, but $66,500 of this amount was to be used in purchasing the remaining 665 shares of common stock for deposit in a voting trust. Other outstanding securities of the Rochester, first preferred stock and bonds, neither of which had any voting rights, were held by the public. There were complicated limitations upon the voting rights of the second preferred stockholders, but the dominating circumstances touching voting rights were that in major matters no vote of stockholders could be effective unless concurred in by eighty per cent of the common stock and that the Executive Committee and the Board of Directors were elected by cumulative voting of the common stock, thereby assuring New York five out of fifteen members of the Board of Directors and two members in an Executive Committee of five.

Putting all these factors in the context of the circumstances under which the Rochester came into being, the manner in which it was financed, the operation of the voting trust, and the stake of the New York in the Rochester, the Commission, after full hearing and due consideration, concluded that

"the New York Company, through stock ownership, is the dominant financial factor in the respondent company and also, that this, taken together with their contractual arrangements and other pertinent facts and circumstances appearing in the record, unquestionably gives the New York Company power to control the functions of the Rochester Telephone Corporation."

The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control.[31] This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities

[31] See House Report 1850, 73d Cong., 2d Sess., 4-5; compare 78 Cong. Rec. 8446.

in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 303, *et seq.*

Decree affirmed.

Mr. Justice McREYNOLDS concurs in the result.

Mr. Justice BUTLER.

Appellant's complaint shows that prior to making its final order November 18, 1936, the commission made general orders 1, 2, 3, 5, 6a and 9, directing that every telephone carrier subject to the Act file statements concerning its business and affairs. Declining to recognize the Act as applying to it, appellant withheld compliance. The commission ordered it to obey or to file answer setting forth the facts on which it relied as justification for failure so to do. Appellant then applied to the commission for determination that it is not subject to the Act or the commission's jurisdiction because exempted under § 2(b)(2). After hearing, the commission made the final order declaring appellant subject to all common carrier provisions of the Act "and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers . . ." Thus plainly it made the general orders above mentioned applicable to appellant.

The complaint challenged the validity of these orders on the ground *inter alia* that appellant as a matter of law is, and by the evidence and facts found by the commission is shown to be, not subject to any of them. The prayer is for decree "setting aside and annulling said orders . . . and each and all of them and enjoining the enforcement of" them. In the district court, appellees raised no question as to its jurisdiction. But here they argue: The commission's determination classifying the appellant as subject to its jurisdiction and to the general orders is not an order reviewable under the terms of the Urgent Deficiencies Act of 1913; the determination neither commands nor directs appellant

to do or refrain from doing anything; the commission could not have instituted a proceeding to enforce it and consequently the court has no jurisdiction to set it aside.

The final order is much more than a mere determination that appellant is subject to the Act. When read, as it must be, in connection with the general orders, it unmistakably puts appellant under a series of affirmative mandates which, if valid, may be enforced under the Act. See 47 U. S. C. §§ 401, 409, 501, 502; 28 U. S. C. § 47 made applicable by 47 U. S. C. § 402a. These unequivocally impose upon appellant burden and expense of preparing and reporting to the commission a vast amount of statistical and other information.

The case presents no debatable question as to the jurisdiction of the district court. A statement of the facts alleged conclusively shows that in purpose, terms and effect the final order constitutes not mere determination or declaration but affirmative commands. There is no occasion to review earlier decisions dealing with affirmative and negative administrative orders and obviously none to overrule any of them or to repudiate or impair the doctrine they establish.* The Court's discussion, extraneous to the issue involved, confuses rather than clarifies.

The findings of the district court are amply sustained by the evidence, and its decree should be affirmed.

Mr. Justice McReynolds concurs in this opinion.

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* See e. g.: Proctor & Gamble v. United States, (1912) 225 U. S. 282, 292 *et seq.* Hooker v. Knapp, 225 U. S. 302. United States v. Balt. & Ohio R. R. Co., 225 U. S. 306, 320. Lehigh Valley R. R. Co. v. United States, 243 U. S. 412. United States v. Illinois Cent. R. R. Co., 244 U. S. 82, 89. Chicago Junction Case, 264 U. S. 258, 263-264. United States v. New River Co., 265 U. S. 533, 539-541. Delaware & Hudson Co. v. United States, 266 U. S. 438, 448. Minneapolis R. R. v. Peoria Ry., 270 U. S. 580. Colorado v. United States, 271 U. S. 153, 161. United States v. Los Angeles R. R., 273 U. S. 299, 309. Gt. Northern Ry. v. United States, 277 U. S. 172. Piedmont & Nor. Ry. v. United States, 280 U. S. 469, 475-477. United States v. Atlanta, B. & C. R. Co., 282 U. S. 522. Standard Oil Co. v. United States, 283 U. S. 235. Alton R. Co. v. United States, 287 U. S. 229. United States v. B. & O. R. Co., 293 U. S. 454. Powell v. United States, 300 U. S. 276, 284. United States v. Griffin, 303 U. S. 226, 232 *et seq.* Shannahan v. United States, 303 U. S. 596, 599.